84-1448

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Multiemployer Pension Plan Amendments Act of 1980 unconstitutionally deprives petitioner of its property without a preseizure hearing.
2. Whether the Multiemployer Pension Plan Amendments Act of 1980 deprives petitioner of an impartial and disinterested tribunal to determine withdrawal liability.
3. Whether an exception to liability under the Multiemplover Pension Plan Amendments Act should be recognized where an employers' withdrawal from the plan was involuntary and prompted by a union's unilateral disclaimer of representation.
4. Whether the Multiemployer Pension Plan Amendments Act of 1980 denies THOMPSON access to the courts.
5. Whether the Multiemployer Pension Plan Amendments Act of 1980 effects a taking without compensation as prohibited by the Fifth Amendment.
6. Whether certiorari should be granted to resolve conflicts in principle among the lower courts.

INTERESTED PARTIES

William F. Lubersky	Trustees of the Western
D. E. Engels	Conference of Teamsters
Eugene H. Gummerson	Pension Trust Fund
Joseph C. Kaspar	
David J. MacKenzie	
Norman C. Pixler	
Angelo Bruscas	
Albert E. DeAtley	
John W. Bacon	
Bernard Eilerts	
Owen L. Bennett	
Robert L. Scott, Jr.	
Nathan J. Fullmer	
Arthur W. Hademan	
Robert Pavolka	
Ben Leal	
George V. Moffatt	
Karl H. Ullman	
Robert E. Marciel	
Edward R. Toliver	
Joseph E. Edgar	
Glenn M. Vance	
George Branson	
Chuck Mack	
Anthony Lock	
Michael W. Barrow	

Thompson Building Materials, Inc.	Petitioner
Kenneth R. Thompson	President, Thompson Building Materials, Inc.

TABLE OF CONTENTS

PAGES

QUESTIONS PRESENTED i

INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS ISSUED BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND ACTS INVOLVED 2, 3

STATEMENT OF CASE 3

ARGUMENT 4

I. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 UNCONSTITUTIONALLY DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT A PRESEIZURE HEARING ... 4

II. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 DEPRIVES PETITIONER OF AN IMPARTIAL AND DISINTERESTED TRIBUNAL TO DETERMINE WITHDRAWAL LIABILITY. 7

III. AN EXCEPTION TO LIABILITY UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT SHOULD BE RECOGNIZED WHERE AN EMPLOYER'S WITHDRAWAL FROM THE PLAN WAS INVOLUNTARY AND PROMPTED BY A UNION'S UNILATERAL DISCLAIMER OF REPRESENTATION 8

IV. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 DENIES THOMPSON ACCESS TO THE COURTS . 10

TABLE OF CONTENTS (Continued)

V. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 EFFECTS A TAKING WITHOUT COMPENSATION . 11

VI. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS 12

CONCLUSION 13

APPENDIX 14

TABLE OF AUTHORITIES

CASES	PAGES
Armstrong v. Manzo, 380 U.S. 545, 552 (1965)	5
Armstrong v. United States, 364 U.S. 40, 49 (1960)	11
Commission Drivers Local 187 Pension Fund v. Hertz Corp., 3 E.B.C. 1801 (E.D. PA July 13, 1982)	5
Fuentes v. Shevin, 407 U.S. 67 (1972)	5, 6
Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)	11
Grand Bahamas Petroleum Co., Ltd. v. Canadian Transportation Agencies, Ltd., 450 F.Supp. 447, 457 (W.D. Wash. 1978)	6
Guzman v. Western State Bank, 516 F.2d 125, 130 (8th Cir. 1975)	6
Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 534 note 16 (5th Cir. 1978)	6
Keith Fulton & Son, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 741 F.2d 451 (1st Cir. 1984)	13
Lynch v. United States, 292 U.S. 571 (1934)	11, 12
Northern Pipeline Construction Company v. Marathon Pipeline Company, 102 S.Ct. 2858, 2867-69 (1982)	11
Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F.Supp. 523 (W.D. Wash. 1982)	8, 9

TABLE OF AUTHORITIES (Continued)

Pennsylvania Coal Company v. Mahon,
260 U.S. 393 (1922) 11, 12

United States v. Causby,
328 U.S. 256 (1946) 11

United States General, Inc. v. Arndt,
417 F. Supp. 1300, 1312 (E.D. Wis. 1976) .. 7

Ward v. Village of Monroeville, Ohio,
409 U.S. 57, 93 S.Ct. 80 (1972) 7

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Article III, §1 ..... 2, 10, 11

U. S. Constitution, Amendment V 2, 3, 11

STATUTES

29 U.S.C. §1399(b)(2)(C)(i) 4, 5

29 U.S.C. §1399(c)(3) 4

29 U.S.C. §1401(a)(1) 5

29 U.S.C. §1399 7

29 U.S.C. §1401(a)(3) 7

29 U.S.C. §1301(a)(10)(A) 7

29 U.S.C. §186(c)(5) 8

29 U.S.C. §1001a 9

29 U.S.C. §1001a(4)(A) 9

29 U.S.C. §1001a(C) 9

ACTS

Multiemployer Pension Plan Amendments Act of
1980, 29 U.S.C. §1381, *et seq.* ..... Passim

NO.

IN THE

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OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

THOMPSON BUILDING MATERIALS, INCORPORATED, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on December 27, 1984.

OPINIONS ISSUED BELOW

The December 27, 1984 opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is yet unreported. It is reprinted in the accompanying appendix. The April 25, 1983 reporter's transcript of the proceedings of the United States District Court for the Central District of California is also reprinted in the accompanying appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 27, 1984. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the first section of Article III of the United States Constitution, which provides as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

This case involves the Fifth Amendment to the United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutes involved in this case are too lengthy to produce herein. A listing of the pertinent statues is provided below and the text of these statutes are reproduced in entirety in the accompanying appendix.

29 U.S.C. §1399(b)(2)(C)(i)

29 U.S.C. §1399(c)(3)

29 U.S.C. §1401(a)(1)

29 U.S.C. §1399

29 U.S.C. §1401(a)(3)

29 U.S.C. §1301(a)(10)(A)

29 U.S.C. §186(c)(5)

29 U.S.C. §1001a

29 U.S.C. §1001a(4)(A)

29 U.S.C. §1001a(C)

STATEMENT OF THE CASE

This action concerns the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381, *et seq.* ("MPPAA"). Petitioner THOMPSON BUILDING MATERIALS, INCORPORATED ("THOMPSON") is an employer who, prior to December 2, 1980, made contributions to the WESTERN CONFERENCE OF TEAMSTERS PENSION PLAN which was sponsored by the WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND ("FUND").

On December 2, 1980, TEAMSTERS LOCAL 952 ("TEAMSTERS") notified THOMPSON that it disclaimed any interest

in representing the employees of THOMPSON. THOMPSON, as a result of the union disclaimer, was forced to involuntarily withdraw from, and cease contributions to, the FUND.

Subsequently, on February 9, 1982, the FUND notified THOMPSON that it was responsible for $103,156.52, representing an unfunded vested benefit liability. THOMPSON did not make any payment of the assessed liability and the FUND brought an action under 29 U.S.C. §1401(b)(1) to collect the sum due and owing.

The United States District Court for the Central District of California asserted subject matter jurisdiction of the FUND's complaint seeking collection of withdrawal liability pursuant to 29 U.S.C.§1401(b)(1). The FUND filed a motion for summary judgment and at the conclusion of the April 25, 1983 hearing, the Honorable Cynthia Holcomb Hall granted the FUND's motion. THOMPSON then brought an appeal in the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. 1291. The United States Court of Appeals for the Ninth Circuit rejected THOMPSON's constitutional challenges to the statute and its argument for an exception to withdrawal liability where an employer's withdrawal is involuntary and caused by the union. It affirmed the ruling of the United States District Court for the Central District of California.

ARGUMENT

I.
THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 UNCONSTITUTIONALLY DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT A PRESEIZURE HEARING.

The MPPAA requires that a withdrawn employer, within 60 days after notification of a demand for payment, either remit the entire amount demanded or commence payment by way of monthly installments computed under 29 U.S.C. §1399(b)(2)(c)(i) and 29 U.S.C. §1399(c)(3). The employer is obligated

to make these payments, and the FUND may collect them, even though the assessment may be in dispute. *Commission Drivers Local 187 Pension Fund v. Hertz Corp.* 3 E.B.C. 1801 (E.D. PA. July 13, 1982).

Section 1399(b)(2) provides that a demand for review be made within ninety days. There is, however, no mandatory time limit within which a review must take place. If the review is not conducted after a request, as many as two hundred ten days may pass after the FUND's payment demand until an arbitration request would be timely. 29 U.S.C. §1401(a)(1). The MPPAA does not specify how soon after an arbitration demand is made that the arbitration must occur. Moreover, it fails to specify any time limits within which an arbitration decision, if a hearing is held, must be rendered.

Accordingly, in a collection action such as the one brought by the FUND in the case at bar, a court hearing the matter retains no discretion to revise or disregard the withdrawal liability payment schedule in order to protect the withdrawn employer from grievous injury. The court's sole function is merely to put its imprimatur on the MPPAA procedures taken by the FUND.

THOMPSON has incurred a liability in excess of $150,000.00 in violation of fifth amendment guarantees that no individual be deprived of property without due process of law. Procedural due process mandates that a deprivation of property follow prior notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong vs. Manzo*, 380 U.S. 545, 552 (1965).

It is a fundamental proposition of our constitutional system of government that an individual be afforded due process before being required to sustain a loss of his property. In *Fuentes vs. Shevin*, 407 U.S. 67 (1972) the Supreme Court explained that the right to notice and an opportunity to be heard is calculated to guard citizens' rights to the use and enjoyment of their property against "substantially unfair or mistaken deprivations." *Id.* at 80-81. To be effective, notice and a hearing must occur when the deprivation can still be prevented.

THOMPSON has a judgment in excess of $150,000.00 imposed upon it to pay an asserted obligation to the FUND for

withdrawal liability which has been assessed before any impartial tribunal has had an opportunity to review the merits of the FUND's claim. In *Fuentes, supra,* the Court delineated those conditions which would justify a post-taking hearing. They are as follows: (1) The taking must be directly necessary to accomplish an essential governmental or public interest; (2) there must be a special need for very quick action; and (3) the government must keep strict control over its monopoly of legitimate force. *Id.* at 91. Each of these prerequisites must be satisfied. *Grand Bahamas Petroleum Co., Ltd. vs. Canadian Transportation Agencies, Ltd.*, 450 F.Supp. 447, 457 (W.D. Wash. 1978).

The MPPAA fails to satisfy the due process taking requirements enumerated in Fuentes. Under the statutory scheme there is no governmental or general public interest present which would support the requirement that THOMPSON remit its withdrawal liability payments before it has had an opportunity to have its claim heard on the merits. Rather than there being a governmental or general public interest present here, there is instead only competing private interests. On the one hand, THOMPSON, which was forced to withdraw by the TEAMSTERS, wishes only to protect its assets. On the other, the FUND wishes to procure withdrawal liability assessments against an employer who would still be paying into the FUND had it not been compelled to withdraw by the TEAMSTERS.

Similarly, the FUND has failed to show, and indeed cannot show, that there is a special need for it to institute immediate collection efforts of withdrawal liability assessments before the merits of its claim are heard and adjudicated.

Finally, the MPPAA fails to satisfy the third Fuentes standard. No officer of the court decides, pursuant to the standards of a narrowly drawn statute, whether a pre-hearing deprivation is warranted. It does not require that the FUND appear before an officer of a court as a prerequisite to obtaining its withdrawal liability assessments. At the very minimum, procedural due process requires that some judicial officer take part in any deprivation of property and have the discretion to deny the FUND's claim. *Guzman v. Western State Bank*, 516 F.2d 125, 130 (8th Cir. 1975); *Johnson v. American Credit Co. of Georgia*,

581 F.2d 526, 534 note 16 (5th Cir. 1978); *United States General, Inc. v. Arndt*, 417 F. Supp. 1300, 1312 (E.D. Wis. 1976).

II.
THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 DEPRIVES PETITIONER OF AN IMPARTIAL AND DISINTERESTED TRIBUNAL TO DETERMINE WITHDRAWAL LIABILITY.

THOMPSON asserts that the MPPAA statutory review scheme deprives him of his constitutional right to an impartial and disinterested tribunal. The FUND's trustees exercise the mandatory review of all disputes over withdrawal liability assessments. 29 U.S.C. §1399; 29 U.S.C. §1401(a)(3); 29 U.S.C. §1301(a)(10)(A).

The reasons for THOMPSON's assertion are simple. Inasmuch as it is to the FUND's benefit to assess as large a withdrawal liability to an employer as is possible, it cannot be said to be dispassionate, disinterested, and neutral.

As the Court stated in *Ward vs. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80 (1972), every individual has the right to "a neutral and detached judge in the first instance." *Id.* at 61-62. Consequently, even subsequent review of the challenged decision does not salvage the initial deprivation.

The FUND's trustees hold two inconsistent positions. One is partisan, the other adjudicatory. On the one hand, the trustees are empowered to administer the trust funds, which includes collection of delinquent contributions and withdrawal liability assessments. Obviously, these withdrawal liability assessments add substantially to the FUND's coffers.

On the other hand, the trustees sit in an adjudicatory capacity when, in the first instance, they decide disagreements concerning the assessment of withdrawal liability. It is obvious that trustees who have initially calculated assessments with regard to a particular employer, will encounter difficulties in remaining dispassionate and disinterested arbiters when challenges by employers to their own calculations are made.

Therefore, the prohibited possibility of bias exists under the MPPAA.

Conflict as to the issue of denial of an impartial tribunal exists among the U.S. Courts of Appeal. A discussion of the existing conflict is further set forth under Section VI. of the Argument to this petition.

III.
AN EXCEPTION TO LIABILITY UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT SHOULD BE RECOGNIZED WHERE AN EMPLOYER'S WITHDRAWAL FROM THE PLAN WAS INVOLUNTARY AND PROMPTED BY A UNION'S UNILATERAL DISCLAIMER OF REPRESENTATION.

On December 2, 1980, TEAMSTERS disclaimed interest in representing THOMPSON's employees. THOMPSON was, therefore, compelled to cease making contributions to the FUND since to do so would have violated 29 U.S.C. §186(c)(5).

In effect, the TEAMSTER's unilateral disclaimer of interest in representing THOMPSON's employees caused THOMPSON's withdrawal from the FUND. Had the TEAMSTERS not walked away from THOMPSON's employees, THOMPSON would still be making its monthly payments to the FUND. It was through the TEAMSTERS' action, and the TEAMSTERS' action alone, that THOMPSON incurred its withdrawal liability.

The district court concluded that involuntary as THOMPSON's withdrawal may have been, that fact was irrelevant. The district court cited *Pacific Iron & Metal Co. vs. Western Conference of Teamsters Pension Trust Fund*, 553 F.Supp. 523 (W.D. Wash. 1982). In that case, the court acknowledged that the MPPAA was designed to remedy the pre-MPPAA incentive of employers to withdraw from pension plans.

The court stated:

> "However, other purposes of the MPPAA were to protect the employers substantially increased

> funding obligation and to insure that the millions of employees, retirees, and their dependents would continue to receive the pension benefits promised and relied upon. 29 U.S.C. §1001a. From the perspective of the remaining employers in the plan and of the employees who expect to receive benefits from the plan, the voluntariness of one employer's withdrawal is irrelevant. What they are concerned with is there being sufficient funds to meet the obligations of the fund." *Id.* at 526.

An examination of 29 U.S.C. §1001a, however, reveals that the *Pacific Iron* court misconstrued that provision. Congress did *find* that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, . . ." 29 U.S.C. §1001a(4) (A). The *policy* of the MPPAA, however, is:

> ". . . .
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
>
> (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
>
> (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans." 29 U.S.C. §1001a(C).

It is patently obvious that the problems which discourage the maintenance and growth of multiemployer pension plans do not emanate from an employer, such as THOMPSON, which, until it was forced to withdraw by the TEAMSTERS, regularly made its payments to the FUND.

Congress was not unaware of the burdens placed on an employer such as THOMPSON, which was victimized by the

union's precipitation of involuntary withdrawal. It chose to ignore the problem, however. The MPPAA directed the Pension Benefit Guaranty Corporation (PBGC) to conduct a separate study with respect to:

> "...
>
> (B) The necessity of adopting special rules in cases of union mandated withdrawals from multiemployer pension plans.
>
> (2) The corporation shall report to the Congress the results of the stud[y]...including its recommendation with respect thereto."
>
> MPPAA, P.L. 96-364, Title IV, §412(a),94 Stat. 1309.

Obviously, Congress chose not to address directly the dilemma now faced by THOMPSON. The fact that Congress acknowledged the problem, however, evidences its legitimacy.

The Ninth Circuit Court of Appeals did not address the issue of whether a union legitimately could withdraw as a deliberate tactic to impose withdrawal liability on an employer because the record was silent on why the union withdrew. The silence was due to the summary judgment rendered in the District Court, thereby denying THOMPSON a trial on the merits.

IV.
THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 DENIES THOMPSON ACCESS TO THE COURTS.

By requiring that withdrawal liability assessment disputes be resolved through arbitration, THOMPSON is barred from contesting the FUND's claim in a trial before an Article III judge.

Article III, §1, states that the judicial power shall be vested in the Supreme Court, "and in such inferior courts as the Congress may from time to time ordain and establish." Supreme Court Justices and judges of lesser courts retain their offices for life and their salary cannot be diminished during their term.

Article III, §2, cl.1, provides that the judicial power shall extend to all cases arising under the Constitution or the laws of the United States. In *Northern Pipeline Construction Company vs. Marathon Pipeline Company*, 102 S.Ct. 2858, 2867-69 (1982) the Court identified three situations in which Congress is not subject to the rule that the judicial power be exercised by Article III Courts. These exceptions are as follows: (1) territorial Courts; (2) courts martial; and (3) specialized legislative courts adjudicating "public rights." Inasmuch as withdrawal liability disputes do not concern any of these three exceptions, the MPPAA does not admit of an exception to the Article III guarantee that withdrawal liability disputes be heard in front of a judge.

V.
THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 EFFECTS A TAKING WITHOUT COMPENSATION.

The fifth amendment precludes the taking of private property by the federal government without just compensation. This is to prevent the government from compelling certain individuals alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole. *Armstrong vs. United States*, 364 U.S. 40, 49 (1960).

A taking may be accomplished by nonacquisitive governmental action. *Pennsylvania Coal Company vs. Mahon*, 260 U.S. 393 (1922); *United States vs. Causby*, 328 U.S. 256 (1946). Moreover, in those circumstances where the governmental regulation is "so onerous [the Court will find that it] constitutes[s] a taking which requires compensation". *Goldblatt vs. Town of Hempstead*, 369 U.S. 590, 594 (1962). The instant case concerns a government statute which is onerous. It deprives THOMPSON of its property rights in its contract with the TEAMSTERS and confiscates in excess of $150,000.00 to essentially pay the debt of the FUND. See *Lynch vs. United States*, 292 U.S. 571 (1934).

The case at bar is similar to *Pennsylvania Coal, supra.* There, the Court held that a state statute so frustrated the

plaintiff's investment-backed expectations that it amounted to a taking. The claimant there had sold the surface rights to particular parcels of property and had expressly reserved the right to remove the coal underneath. The state statute, enacted subsequent to the transaction, disallowed the mining of coal in a manner that caused subsidence of any dwelling, unless the dwelling was the property of the owner of the underlying coal. The general public purpose of this statute was to prevent the subsidence of the houses of neighboring land owners. Because, however, the statute made it commercially impracticable to mine coal, for all intents and purposes, it destroyed the rights that the claimant had reserved in its contract with the property owners. The Court held that the statute had affected a taking of the claimant's property without just compensation. *Id.* at 414-415.

Similar factors are present in the case at bar. THOMPSON's collective bargaining agreement constitutes a property interest protected by the fifth amendment. *Lynch vs. United States*, 292 U.S. at 579. This collective bargaining agreement, which describes the contributions to the FUND to be made by THOMPSON was completely superseded by the subsequently enacted MPPAA. In fact, the MPPAA is more egregious than the legislative struck down in *Pennsylvania Coal*, simply because MPPAA authorizes the *direct appropriation* of THOMPSON's property by the FUND. The appropriation of in excess of $150,000.00, to pay the unfunded vested benefits liability of the FUND constitutes a taking for public use.

VI.
CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

The opinion rendered by the Ninth Circuit Court of Appeal in the case at issue clearly shows a conflict in principle among the lower courts.

As to the issue of whether the MPPAA deprives THOMPSON of an impartial tribunal by giving the FUND's trustees initial

responsibility to determine the withdrawal liability, most of the appellate courts that have addressed this argument have found no institutional bias on the part of the trustees. However, the first circuit in *Keith Fulton & Sons, Inc. vs. New England Teamsters and Trucking Industry Pension Fund*, 741 F.2d 451 (1st Cir. 1984) held that the trustees are compelled by their fiduciary duty to the FUND to assess the highest possible liability, or they may be motivated by intentions to punish the withdrawing employer or deter others from withdrawing.

It is therefore clear that there is a conflict in principle in the circuit courts and this petition for writ of certiorari should be granted to resolve this conflict.

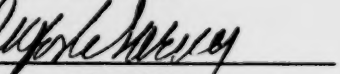
CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: February 14, 1985

LAW OFFICES OF
ROGER A. SAEVIG

By 

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE CYNTHIA HOLCOMB HALL,
JUDGE PRESIDING

- - -

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,	)	
Plaintiff,	)	
vs.	)	No. CV 82-5337-CHH
THOMPSON BUILDING MATERIALS, INC., a California corporation,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, April 25, 1983

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Official Reporter
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312 North Spring Street
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(213) 620-9001

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LOS ANGELES, CALIFORNIA; MONDAY,

APRIL 25, 1983; 10:00 A.M.

-oOo-

THE CLERK: Item No. 1: CV

82-5377-CHH;

Trustees of the Western Conference of

Teamsters Pension Trust Fund vs.

Thompson Building Materials.

Counsel, please state your

appearances.

MR. HASSON: Good morning, your Honor. Kirke Hasson of Pillsbury, Madison & Sturo for plaintiff and moving party Pension Trust Fund.

MR. MOSS: Herbert A. Moss for the defendant and responding party Thompson Building Materials Company.

THE COURT: All right. I have received the proposed judgment and your further affidavit filed this morning, Mr. Hasson.

MR. HASSON: Yes, your Honor.

THE COURT: Before I get to that, let me say I propose to grant the plaintiff's motion for summary judgment.

I had no problem with the calculation of principal, liquidated damages, and costs, and my only problem was with the interest. You have since shown how you calculated the interest.

Mr. Moss, do you have any problem with the calculation of the interest?

MR. MOSS: Your Honor, I haven't calculated it.

I know this sounds like a cop-out, but I mean it quite seriously. I have sufficient faith in the integrity and competence of Counsel. If that is what he came up with, I am sure it is an honest calculation.

Obviously, I would like an opportunity to try and change the Court's mind concerning the ruling of granting the motion for summary judgment since I sincerely do feel it is inappropriate.

If the Court is telling me that any argument I make will be a waste of time, then I don't know what to say.

THE COURT: Well, I wouldn't say

that. Let me say that I have read all of the papers, and I am not persuaded by anything that you put in your papers. If you have something that you wish to add, you may.

MR. MOSS: Should we argue then that first before we get into the calculations, your Honor?

THE COURT: Well, I was just asking if you have any problem with the calculations. I gather you don't.

MR. MOSS: No, your Honor.

THE COURT: All right. But I don't want you to repeat what you have in your papers. If there is anything you would like to emphasize, I would be glad to hear from you on that.

MR. MOSS: I would, your Honor.

Your Honor, as this Court is well aware having been the court in the

Victor case, the issue of the Constitutionality of the Act has been litigated not only before this Court but before a number of other judges in this particular Central District. I would represent to the Court that there are at least three other cases that I know of and a fourth one which by coincidence I only found out about this morning when I happened to be conversing with someone in the hallway in which other judges have stayed the proceedings and in essence said, "All right. I am not even going to grant or deny these motions for summary judgment unless and until the Ninth Circuit renders its decision in the Shelter Framing case. There is a case called Boatman Construction which is before Judge Marshall which was stayed.

THE COURT: Well, I think the only serious question on the

Constitutionality as I look at the cases is that problem of retroactivity, and you just do not fit into that problem.

MR. MOSS: Your Honor, so that it is clear to the Court, I agree with you one hundred percent. That is not my argument. So that it is clear to the Court, because we argued this when we came in once before on a status conference, I represent to the Court unconditionally that is not the only issue pending before the Ninth Circuit in

the G&R case and in the Shelter Framing case.

THE COURT: I understand that, but I am not concerned about the other issues. I would be surprised if a lot of cases have dealt with the other

issues that have not even been appealed. If that is the problem, then my recommendation to you is to seek an appeal and preserve your rights on that issue. To me the only really serious problem is the one involving the retroactivity, and since that is my view, I don't see any point in sustaining this.

MR. MOSS: My problem is this: Obviously that puts us in a rather difficult position. We have to appeal it and go through the motions, and then who knows what will happen. Normally I wouldn't be so insistent on this particular point, your Honor, but I am sure that almost any day now -- famous last words, of course -- we are going to have a decision from the Ninth Circuit. It should have been down by now. What the delay is, I do not know.

THE COURT: You never know,

and there is no way of telling when it will come down. I am not going to sit and wait for it.

MR. MOSS: As I told Counsel, I was on the phone literally a week or ten days ago with one of the attorneys who argued Shelter, and I said, "Do you have any word for me because I have to go in in a week or ten days and argue this thing?"

PAGE 7

7

And he said, "Herb, no. We don't have any more word."

I said, "When do you expect a decision," and he said, "Look, we honestly had expected it last month in March," and they were a little surprised they hadn't received it by then.

THE COURT: Well, who knows what is going on.

MR. MOSS: But there are other issues that I am much more disturbed about that relate to this particular case, and the merits of this particular case and not necessarily Constitutionality issues. That is what I would like to address myself to.

THE COURT: All right.

MR. MOSS: First, there is a question of this disclaimer where the Union in essence walks away and says, "Goodbye," whether that constitutes a, quote, withdrawal within the meaning of the Act. There are no cases on that particular issue, and this Court will have to, I think, make a ruling in essence saying okay, we can consider -- I know there is a case that was up in, I think, Washington, a decertification. Your Honor, this is not a decertification. I don't mean to insult the Court. I am not sure

whether the Court understands the difference between the decertification and disclaimer of interest. They are two different situations.

PAGE 8

8

The disclaimer is where the Union says, "We are walking away. Goodbye."

A decertification is where the employees vote them out.

THE COURT: Right.

MR. MOSS: The case that was decided up north, that was a decertification. It was not a disclaimer. And as I had indicated in the papers, there's some question, at least I would argue one, in the Senate Committee report where you have the following phrase. A withdrawal does not take place merely because an employer suspends making contributions during a, quote, labor dispute, closed

quote -- I am adding that for emphasis -- I am adding that for emphasis -- which involves its employees.

Well, your Honor, I submit there is, therefore, a question whether or not a union saying to the employer, "We disclaim. We are walking away," which at that point under Section 302 of the Labor, Management and Relations Act would make it illegal to continue making contributions to the pension fund is a withdrawal.

We did not withdraw. We didn't do anything. This was something totally, utterly, completely beyond the control of the employer. It is something of over which the employer had no say, had no control. There was nothing we could do.

PAGE 9

9

I can assure the Court as a former

attorney with the National Labor Relations Board, I have seen these disclaimers on a number of cases. It is strictly, totally, 100 percent a determination and an action on the part of the union and the union only. The employer has no control, has no say in that particular type of instance.

So, I submit to your Honor that here we are being subjected to this rather large amount of money, as the Court can see, by an action taken by the Union over which we have no control. And I submit, you Honor, that I don't believe that that constitutes, quote, a withdrawal.

THE COURT: Do you have control over decertification?

MR. MOSS: No.

THE COURT: You don't have control there either?

MR. MOSS: But it is at least

something -- well, yes. Maybe to a very limited, limited, limited extent in the sense that I can always tell the employees to vote for the Union. Doesn't happen too often, but the Court has asked the question. It is hypothetical. I have to answer the question that was posed. So, yes, to some limited extent. Realistically, no. In pure theory, yes.

THE COURT: You know I will have to say to you this is one of the most heavy-handed pieces of legislation

that has ever been my pleasure to review, but I do not think that means I can do anything about it. In other words, there was a perceived problem and a legislative solution which, as you know, resulted in sometimes taking a hundred percent of the net worth of

the company itself, but the emphasis was on preserving the pensions of the employees willy-nilly, and I find it very heavy-handed. But I do not find it unconstitutional, and I do not believe it is to the judges to rewrite legislation.

MR. MOSS: No, your Honor. But it is your job as the judge to determine whether or not a disclaimer of interest is the type of action which falls within the contemplated conduct which Congress wrote.

What I am simply suggesting to the Court is, I will represent to the Court, having tried to read the legislative history such that it is there is nothing one way or the other which specifically addresses itself to the situation where a union says, "Okay. Goodbye," and now as a result of that, a company is suddenly hit by

ERISA for unfunded liability. That specific issue is one way or the other. Therefore, I submit to your Honor it is within the Court's responsibility to make a determination either that does or does not come within the purview of the Act.

But that is not my biggest and most serious objection, your Honor.

PAGE 11

11

THE COURT: Let me ask: What is the decertification case again?

MR. MOSS: I'm sorry, your Honor.

THE COURT: What is the decertification case?

MR. MOSS: I am not sure.

THE COURT: What is the name of the case from Washington that the judge in Washington State, or is it the District of Columbia?

MR. HASSON: I could provide that,

your Honor. The case is cited at page 7 of our reply memorandum. It is Pacific Iron and Metal vs. the Western Conference of Teamsters Pension Fund, and it published at 553 F. Supp. 523, and in particular at page 526 that point is discussed.

THE COURT: All right. Thank you. All right. Go ahead.

MR. MOSS: Your Honor, that is not my biggest complaint, argument, objection, whatever word is appropriate here. There is still an issue which this Court is depriving me of and which this Court, even in the Victor case, alluded to in Victor, there was reference to the arbitration requirement of the Act. I have raised an issue as to the count as to the amount that is due. I am not denying the calculations, but I am arguing whether in fact the amount of damages

is correct.

PAGE 12

12

I am arguing, for instance, on such things as the interest assumption. And there was in the file, and there is no issue on this particular point, your Honor, a letter sent by me saying I demand arbitration.

Now, your Honor, somewhere I have got to get my day in court. I don't want to go to arbitration, to be candid with the Court, because arbitration deprives me of my opportunity for discovery. But someplace I have to be given the chance to argue whether or not the damages are correct, whether the interest assumption is correct.

As we have in the papers, there are interrogatories sent out, and as a courtesy to Counsel, we agreed I would withdraw those so that this motion

could be made. But I have demanded arbitration. That letter is in the file, your Honor. It is part of this Court's record. It is alluded to in the declaration made by -- I am trying to think of the fellow's name now -- the appeal in Washington.

MR. HASSON: Moran.

MR. MOSS: Yes. Nick Moran.

It is part of the pleadings, your Honor. The letter is there. It says I demand arbitration.

Now, your Honor, somewhere I have got to be given my day in court, and this is the point that I feel so strongly about.

PAGE 13

13

The cases cited by Mr. Hasson where there is an alleged waiver, voluntary situation where there was no demand made, where the individual did

not within the time allocated send a letter in demanding arbitration. This was demanded in this particular case, your Honor. The letter is in the files.

THE COURT: I understand it is. I have read your brief, and I understand what you are saying.

MR. MOSS: Somehow somewhere I have to be given my day to determine whether or not the damages are proper, are correct.

This Court, if you rule against me, is saying I don't have arbitration, and I don't get my chance here.

THE COURT: What I am saying is that you didn't dance the minuet as set out in the statute. That is why you lose your day in court.

MR. MOSS: Well, I am not quite sure I understand that.

THE COURT: There are certain procedures that are set out. You have to do certain things in certain ways at certain times. That is the way you get it.

MR. MOSS: Your Honor, the demand for arbitration was made timely. It was --

THE COURT: All right. We will hear from opposing counsel if he wishes to respond.

PAGE 14

14

MR. MOSS: Your Honor, there's one other problem, and I apologize to the Court for this, but it is an issue that arose after all these papers were filed. It is something which I got in from Counsel afterward, and I have not had a chance to address myself to this particular issue. I feel I have to bring it to the Court's attention.

Subsequent to the filing of the motion and to the filing of the papers, I received a communication from Counsel, which I apologize I do not have with me, indicating that the Trust Fund, the plaintiffs herein, were contemplating a change in their rules and regulations and the adoption of what is called a construction industry rule. The papers that I received from Counsel indicated that a special rule might be adopted for companies in the construction industry, and Counsel in essence said, "Do you claim you are in the construction industry?"

You Honor, I have not addressed myself to that particular demand by Counsel. This client is in the business of furnishing materials to companies in the construction industry, in the building trades industry. Whether that is or is not being part of

the building and construction industry, I am not sure, and I am not sure, and I am being candid with the Court when I say I am not sure.

The PBGC was supposed to have adopted regulations

Page 15

15

defining "building and construction industry." They have not yet. The Trust Funds, apparently, are going to now, for their purposes, define who is in the building and construction industry.

THE COURT: What effect does that have on this motion?

MR. MOSS: Well, it will in this sense, your Honor. If in fact we are in the building and construction trade industry, and we come within these new regulations, then this may affect the liability.

THE COURT: In what way?

MR. MOSS: I don't know;that is my problem, your Honor, because I don't know what rules they are contemplating, whether they are going to say that they are people in the building and construction trades if you do this and/or that, and you have liability, for example, up to 30 percent of your net worth and so on, your Honor.

Until this is clarified, there is a major issue because under the 1980 Act, there is some issue on the, for example, 30 percent of the net worth, and it is not clear to me therefore whether -- since this just arose--

THE COURT: What is your man's net worth? Do you have any idea?

MR. MOSS: No, your Honor, I do not. I must candidly admit to the Court that I have not had a chance to

check this out because this may be in excess of the 30 percent of the net worth, and until I can get this resolved with the issue on the construction industry and the net worth, again, the calculation, the amount that is owed may be excessive. I don't know. He may be worth three million, and he may only be worth a hundred and fifty thousand dollars.

THE COURT: Let's hear from opposing counsel next, please. Do you want to respond to the points, Mr. Hasson?

MR. HASSON: Yes, your Honor. Let me start at the end.

We have informed Counsel that the Trustees of our Fund are considering the possibility, and they have not taken any action on this, any final

decision, considering the possibility of adopting a special withdrawal rule for companies in the construction industry defined, incidentally, in a definition that was sent to Counsel which excludes suppliers of materials. In any event, the purpose for such a definition would be for the special definition of withdrawal under ERISA which makes it in effect not a withdrawal if you do not continue in business. If you are in the construction industry and you completely cease operations, not just that you are continuing them on a non-union basis, then special rules apply. But it is clear from Thompson's

papers that isn't the case with it.

Anyway, the Trustees have taken no action on that point. So that

discussion has to do with speculative, non-currently operative possibilities.

As to Counsel's reference to interest rates, I think Counsel will agree that what he is referring to when he talks about the interest rate assumptions that he wishes he had disputed or would like to dispute is an entirely different thing from the issue of interest calculations on the judgment.

THE COURT: I understand that. You are talking about your calculations as to liability itself and the assumptions made by the Pension. I understand that.

MR. HASSON: That is correct, your Honor. And because those actuarial matters are so complex, Congress did, indeed, set up a procedural framework that one must follow.

One thing is clear from the

statute and is brought out again in the Ceazan case, a copy which was attached to our reply papers, is that you can't just send a letter saying, "I demand arbitration."

The way the statute works, it is a prerequisite

for the arbitration that you state your grievance to the Fund, what you request be reviewed, call any additional relevant facts to the Fund's attention, and the Fund will have a chance to review that.

In any event, even if an employer had done that, which Thompson did not, his time then would begin to run. Not demand arbitration but to initiate it. The idea being that an employer can't toll this forever by just sending a letter demanding it. He has to

initiate arbitration. There are procedures available to do that. Thompson did not do so.

The Fund's initial demand letter clearly advised Thompson that was not only not the statute, which people at that point would presume to know, but the Fund's further letter response to Mr. Moss' letter advised him again, and even now we don't hear any reason from Mr. Moss about why Thompson did not follow the statute except that Mr. Moss believes it is unfair. The statute makes arbitration a mandatory procedure.

It, nonetheless, is clear that the statute does that, and we concur completely with your Honor's observation. Whether not not Congress was being heavy-handed or acting in a most wise way in this regard is not the issue for this Court.

THE COURT: All right. You want to respond

to the disclaimer? I know you have in your reply brief.

MR. HASSON: Well, your Honor, not only is there is the case which is cited to the Court in our reply brief, but there is logic behind it which is that this is liability imposed upon an employer as a result of liabilities which have already accrued to the Fund. If employers leave, for whatever reason -- whether it is their sole choice or a combination of their choice and the union or solely due to union pressure -- is not a pertinent point. Indeed, as pointed out in the Pacific Iron and Metal case, it would be opening up a can of worms if one were to have to litigate what is voluntary. When an

employer goes out of business, that certainly is not the fault of the union or, at least, does not seem to be. Yet the voluntariness of that act could be debated for some time and is totally irrelevant to the fact that the employer's employees are still expecting to get a pension for work they have already performed.

In terms of the legislative history of an additional point which supports this interpretation is that one of the essentials of the Multi-Employer Plan Amendment Act cited in our reply memorandum directs the PBGC, the government agency involved, to study whether Congress should enact some legislative distinction between withdrawals that were caused by the voluntary acts of employers and

withdrawals that were initiated by

union conduct. I assume PBGC has followed Congress' directive and is studying that. But for the moment there is no distinction, and it is clear that Congress didn't intend -- one, it intended some study on the subject, whether there should be some.

MR. MOSS: Your Honor, I would like to respond to one particular issue that Counsel made because it is very critical in my opinion.

Counsel makes reference to the initiation of certain arbitration procedures. I would respectfully point out to the Court that the statute itself does not contain the procedure, the mechanism for this. This is one of the problems that you have with the statute.

What Counsel is alluding to, and I think is very critical, your Honor, is the procedures which the Fund itself

said these are going to be the procedures to which my client was not a party, to which he never agreed. This is one party to a proposed arbitration saying here are my rules. Here are my regulations, and here is what you have to follow because this is what I have decided you have to do.

Congress did not in this particular Act set forth the procedures, the so-called mechanism of implementation of the arbitration. The trust funds did that, and now Congress is saying well, you have to comply with what we

say you have got to do. It is a unilateral imposition of a contract to which my client did not agree, was not a party, and, in fact, to which it could not even be bound because these

procedures were adopted after he was no longer signatory to the contract and was no longer bound by the so-called Trust Funds.

Counsel is making me comply with his regulations as adopted by his client in saying you didn't do what we have said you have got to do and, therefore, now you can't do anything. Well, your Honor, I submit there was a demand for arbitration, and Mr. Moran's declaration contains the letter which was in reply which says no arbitration. I respectfully ask the Court to look at the response by Mr. Moran to the demand for arbitration. He said, "No way. Get lost."

Now, your Honor, I know I am being repetitive, and I apologize to the Court, but somewhere we have got to have our day in court. There was a demand for arbitration. I am not

required to comply with a procedure unilaterally adopted by the other side, and I submit, your Honor, that either I get my day in court here or this Court in essence says that arbitration has to be exhausted. And if it has to be exhausted, therefore, this proceeding be stayed unless and until the procedures of arbitration have been exhausted.

PAGE 22

22

Thank you.

THE COURT: All right. Mr. Hasson, do you wish to reply to that?

MR. HASSON: I am sorry, your Honor.

THE COURT: Do you wish to reply to that?

MR. HASSON: Just to say this, your Honor, that Counsel is not accurately reflecting what was said in

Mr. Moran's statement. Is is attached as Exhibit H to the declaration of Mr. Moran which was filed March 11th. It says:

> "The demands for arbitration in your letters are of no effect. If any of those three employers disputes any determination of its employer withdrawal liability, its remedy is to seek review or take other actions specified in ERISA Section 4219(b)(2). After timely action thereunder, one or more of your clients may be able to initiate arbitration. The manner in which to initiate an arbitration is set forth in the Fund's withdrawal liability arbitration rules (copy enclosed)."

In other words, the Fund has been explaining to Thompson for some

time that the matter isn't even ripe for Thompson to initiate an arbitration unless it follows the action under Section 4219 to request review before the right

to any arbitration arises. It wasn't just that the Fund wrote back to Thompson and said no.

THE COURT: All right. I am going to grant the motion for summary judgment, and the question that is left before us is how much time you need to file your proof concerning attorneys' fees.

MR. MOSS: Your Honor, if we might --

MR. HASSON: Your Honor, if we might have 20 days to get the expense in order from this trip. Fifteen days, if the Court prefers.

THE COURT: Okay. Let's see. This is the 25th.

MR. HASSON: Today is the 25th.

THE COURT: The 16th.

MR. MOSS: Yes, your Honor. There was an issue raised of fact, your Honor, pertaining to those fees. My assertion is that I felt that they were excessive. I also pointed out to the Court that part of the fees being demanded related to the defense of a motion for change of venue which was filed --

THE COURT: You may respond to this in writing. I am going to give you a chance to respond to his proposed amount of fees, and you may respond in writing.

How much time will you need to reply?

MR. MOSS: Fifteen days would be adequate, your Honor.

THE COURT: Okay. We will say that you should by May 31.

An for a reply then, Mr. Hasson?

MR. HASSON: Ten days, your Honor.

THE COURT: All right. June 10th.

MR. MOSS: Could I have the Court's indulgence for a second? Could I have the timetable again just so I have it clear in my mind?

THE COURT: The plaintiff will file on May 16th, and you are to reply on or before May 31st. The plaintiff may reply to your reply on June 10th. Then we will take the matter under submission and not have any further hearings.

MR. MOSS: Your Honor, please bear with me. I am not that familiar with the procedure, and I need some guidance.

Is the final entry of this judgment to be deferred until there is a final final? What I am concerned with --

THE COURT: No. Entry of judgment will be today, and we will determine the amount of attorneys' fees at a later date.

MR. MOSS: The reason I am raising the question is because then I would think that would require of me that today would start the tolling of when I have to file my notice of appeal as opposed to, say, June the 10th. That is

25

what has me a little concerned, your Honor. I am not sure of the procedural problem because I have my time to file the appeal which starts from today. If it is at all possible, your Honor, if

it creates no problem for everyone concerned, I would hope that you would have one final judgment and my time to appeal would start to run from then. To be quite honest with the Court, I am also hoping in the interim maybe Shelter will come down.

THE COURT: I am going to enter judgment today, and probably it will be entered tomorrow. Your time for appeal will start to run.

MR. HASSON: Your Honor, I had given before your Honor a copy of the form of judgment which was lodged this morning. Am I to understand that the blanks in that will be filed?

THE COURT: Yes. Signed today and probably entered tomorrow.

MR. HASSON: Thank you.

(End of proceedings.)

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE CYNTHIA HOLCOMB HALL,
JUDGE PRESIDING

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND, Plaintiff,	)	
vs.	)	No. CV 82-5377-CHH
THOMPSON BUILDING MATERIALS, INC., a California corporation, Defendant.	)	

- - -

C E R T I F I C A T E

I hereby certify that I am a duly appointed, qualified and acting Official Court Reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Monday, April 25, 1983, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of June, 1983.

/s/ LORAINE M. DALEY
Official Reporter

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Board of Trustees of the Western Conference of Teamsters Pension Trust Fund	CASE NUMBER CV 82-5377 CHH
PLAINTIFF(S)	
vs	
Thompson Building Materials, Inc.	NOTICE OF ENTRY
DEFENDANT(S)	

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

Your are hereby notified that a judgment granting plaintiff's motion for summary judgment and entering judgment in favor of plaintiff and against defendant in the above entitled case was entered in the docket on 4-28-83.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be

claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

APPENDIX C

"FILED"
DEC 27 1984
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CLERK, U.S.
COURT OF
APPEALS

"FOR PUBLICATION"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,	No. 83-5893 D.C. NO. CV 82-5377-CHH
Plaintiff-Appellee,	
v.	
THOMPSON BUILDING MATERIALS, INCORPORATED, a California Corporation,	O P I N I O N
Defendant-Appellant.	

On appeal from the United States District Court for the Central District of California

Hon. Cynthia H. Hall, District

Judge, presiding

Submitted* -- May 9, 1984

Before: HUG**, TANG and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

Thompson Building Materials, Inc. (Thompson), appeals summary judgment by the district court in an action under the Multiemployer Pension Plan Amendments Act of 1980. The court

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit rule 3 (f).

**Judge Hug was chosen to replace Judge Ely on the panel, following the death of Judge Ely.

held that Thompson was liable to the Western Conference of Teamsters Pension Fund (the Fund) for $103,156.52 in withdrawal liabilities, and for additional amounts in interest, liquidated damages and costs.

Thompson mounts a broad constitutional attack on the Act's statutory withdrawal liability provisions, contending that the Act is unconstitutional on grounds that it (1) impairs contractual obligations, (2) denies Thompson an impartial tribunal, (3) denies a meaningful hearing, (4) denies access to the courts, and (5) constitutes a taking without compensation. Thompson also argues for an exception to withdrawal liability where an employer's withdrawal is involuntary and caused by the union.

We reject Thompson's

constitutional challenges to the statute and its argument for an exception, and affirm the district court's ruling.

Statutory Background

Title IV of the Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1301 et seq., established a system of insurance to protect employees' interests in accrued pension benefits in the event that their pension plan failed or terminated with insufficient funds. The program is administered by the Pension Benefit Guarantee Corporation (PBGC), a governmental entity, and is funded by premium payments from the pension plans. 29 U.S.C. § 1306.

As originally enacted, ERISA allowed the PBGC, in its discretion, to underwrite certain nonforfeitable benefits if

a terminating multiemployer plan lacked sufficient funds. 29 U.S.C. § 1361.[1] The PBGC could recover amounts if expended in proportionate shares from the employers, provided certain contingencies were met. Specifically, liability was dependent upon the PBGC's decision to exercise its discretion to make the expenditure and upon the employer's having contributed to the fund within the five year period immediately preceding termination. In addition, no individual employer's liability could exceed thirty percent of that employer's net worth. 29 U.S.C. § 1364.

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (1980) in response to the PBGC's advice that the contingent

liability provisions of ERISA gave employers an incentive to withdraw from multiemployer plans. The MPPAA required withdrawing employers to pay to the multiemployer fund a proportionate share of the fund's "unfunded vested benefit liability." 29 U.S.C. § 1381. The "unfunded vested benefit liability" measures the shortfall in the fund's assets. The fund's "vested benefit liability" is the actuarial present cash value of all of the benefits that have vested. If the pension fund has insufficient assets to cover its vested benefit liability, the difference between the assets and the liability is the "unfunded vested benefit liability."

The fund's trustees have initial responsibility to determine the employer's allocable share of the unfunded vested

benefit liability and to collect the amounts due. 29 U.S.C. § 1382. The Act sets out several different methods of calculating the withdrawal liability, 29 U.S.C. § 1391, and also allows the trustees, with PBGC approval, to design their own methods, 29 U.S.C. § 1391(c)(5)(A). Disputes between the employer and the trustees regarding the amounts assessed must be resolved initially by arbitration. 29 U.S.C. § 1401(a)(1). In the arbitration proceedings, the trustees' calculations are presumed correct, unless the employer shows by a preponderence of the evidence "that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). The arbitrator's award in turn is subject to review by the

courts, 29 U.S.C. § 1401(b)(2), although the arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of the evidence, 29 U.S.C. § 1401(c).

FACTS

The essential facts are undisputed. Prior to December 2, 1980, Thompson participated in the Western Conference of Teamsters Pension Plan (the Plan) and was required to contribute to the Fund on behalf of its employees. On December 2, Thompson ceased its contributions, allegedly because Teamsters Local 952 notified Thompson that it disclaimed any further interest in representing Thompson's employees.[2] Thompson argues that continued contributions to the Fund

would have violated 29 U.S.C. § 186(c)(5).[3]

Page 5

The Fund notified Thompson that Thompson was liable for $103,156.53 as its portion of the Fund's unfunded vested benefit liability. Thompson demanded arbitration of its liability to the Fund, but did not request a reconsideration by the Fund of its calculations or take the other steps required by the Act to initiate arbitration.[4] Despite a subsequent notice by the Fund, Thompson failed to pay the assessed liability, and the Fund brought this action under 29 U.S.C. § 1401(b)(1) to collect the amounts owing. The district court granted the Fund summary judgment.

On appeal, Thompson challenges the constitutionality of the MPPAA's withdrawal liability provisions.

Thompson also argues that the courts should establish an exception to such liability where the employer's withdrawal was involuntary and caused by union action.

DISCUSSION

I. Constitutionality of the MPPAA

This is the second time that the question of the MPPAA's constitutionality has come before this court. In Shelter Framing Corp. v. Pension Benefit Guaranty Corp, 705 F.2d 1502 (9th Cir. 1983), vacated and remanded sub nom., Carpenters Pension Trust v. Shelter Framing, 104 S.Ct. 3550 (1984), a panel of this court held unconstitutional a provision of the MPPAA that imposed withdrawal liability retroactively on employers who withdrew from multiemployer

pensions prior to passage of the Act. The Supreme Court subsequently vacated our decision in Shelter Framing and remanded for reconsideration in light of the Court's decision in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 104 S.Ct. 2709 (1984), in which the Court upheld as constitutional the retroactive provisions that this court had held invalid in Shelter Framing. Both R.A. Gray and Shelter Framing, however, expressly limited their holdings to the retroactive provisions of the Act. See R.A. Gray, 104 S.Ct. at 2717 n.7; Shelter Framing, 705 F.2d at 1514-15. Thompson's withdrawal in the instant case occurred on December 2, 1980, subsequent to enactment of the MPPAA, and consequently R.A. Gray is not controlling.

We also note that several other

circuits have addressed most of the constitutional arguments Thompson raises and with one exception have upheld the Act against constitutional attack. See The Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984) (hereinafter The Washington Star); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), cert. denied, 104 S.Ct. 3554 (1984) (hereinafter Standard Dye); Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247 (7th Cir. 1983), cert. denied, 104 S.Ct. 3554 (1984) (hereinafter Peick); Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (4th Cir. 1983), cert.

denied, 104 S.Ct. 3553 (1984)

hereinafter Republic Industries): But see Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 741 F.2d 451 (1st Cir. 1984) (hereinafter Keith Fulton) (holding unconstitutional the presumption of correctness accorded the trustees' calculations on grounds of due process). With these decisions in mind, we review Thompson's constitutional contentions.

A. Due Process and Impairment of Contract

Thompson contends that the MPPAA violates due process by imposing on Thompson financial liabilities for withdrawal from the Plan that it neither contemplated nor agreed to in its collective bargaining agreement with the Teamsters. Central to Thompson's argument is its belief that

the due process clause of the fifth amendment restricts Congress from impairing contractual obligations to the same extent that the contract clause restricts state governments. U.S. Const. art. I, § 10, cl. 1. The Supreme Court in R.A. Gray, however, expressly rejected this argument. R.A. Gray, 104 S.Ct. at 2720. The Court reaffirmed that, for purposes of due process analysis, economic legislation comes to the court "with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[5] [citations omitted] Id. at 2717-18, quoting Usery v. Turner

Elkhorn Mining Co., 428 U.S. 1, 15 1976). Economic legislation does not

automatically violate due process simply because it upsets settled monetary expectations. Usery v. Turner Elkhorn Mining Co., 428 U.S. at 15-16 (1976). To assess the rationality of the MPPAA, we first must examine the problems that Congress perceived with ERISA in its original form.

By the 1970's many of the industries in which multiemployer plans were most common were in economic decline, and the changing demographics of the work force resulted in a larger proportion of retired to active employees, threatening the plans' contribution bases. See Report of the Committee on Education and Labor, H. R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 54, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 2922 (hereinafter House Report Part I).

ERISA, however, severely

restricted funding alternatives for financially distressed plans, leaving the plans with little choice but to demand increased contributions. Id. See also Report of the Committee on Ways and Means, H. R. Rep. No. 96-869, Part II, 96th Cong. 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 3001 (hereinafter House Report Part II). Unfortunately, ERISA also limited employers' termination liability to a maximum of thirty percent of the employer's net worth. 29 U.S.C. §§ 1362(b)(2);

1364(b). As a result, employers faced with escalating contributions sometimes found termination liability less expensive than continuing the plan. House Report Part I at 54, 61, 1980 U.S. Code Cong. & Ad. News at 2922, 2929.

Further, coverage of the plans under ERISA initially was at the discretion of the PBGC, 29 U.S.C. § 1381 (c)(2) (1976), and if the plan did not terminate within five years after the employer withdrew, the employer escaped all liability for the plan's shortfall, 29 U.S.C. § 1364 (1976). Consequently, employers contemplating withdrawal from financially shaky plans were encouraged to act as early as possible, and gamble either that the PBGC would elect not to cover the plan, or that the plan would survive for five more years. See Standard Dye, 725 F.2d at 849; House Report Part I at 60, 1980 U.S. Code Cong. & Ad. News at 2928. Employers remaining in the plan, on the other hand, had an incentive to terminate it immediately to avoid inheriting the withdrawing employer's

share of the liability.

Because of these effects, the House Committee on Education and Labor found that ERISA in its original form "threaten[ed] the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress." House Report Part I at 55, 1980 U.S. Code Cong. & Ad. News at 2923. See also Report of the Committee on Ways and Means, House Report Part II at 10, 1980 U.S. Code

Page 10

Cong. & Ad. News at 3001. To address these problems, the MPPAA imposed upon withdrawing employers an obligation to fund their proportionate share of the plan's unfunded benefit obligations. 29 U.S.C. § 1381. See House Report Part I at 67, 1980 U.S. Code Cong. &

Ad. News at 2935; House Report Part II at 15, 1980 U.S. Code Cong. & Ad. News at 3004.

We do not consider the MPPAA's statutory withdrawal liability an irrational solution to the funding crisis faced by the multiemployer pension plans. A fund's actuarial soundness at any specific time depends on a complex interaction of many factors including anticipated life spans of beneficiaries, estimated appreciation or depreciation of fund assets, and the likelihood that the contribution base will remain stable. The conservatism with which estimates of these factors are made may affect the outcome, and the numbers that are attached to these concepts are at best "still picture[s] of a moving target." Peick, 724 F.2d at 1267. Even though the process is dynamic, Congress'

decision that the calculations be made upon the employer's withdrawal is reasonable. By forcing the economic burden upon the employer at the time of withdrawal, the Act insures that the employer will give appropriate consideration to the fund's soundness as part of the withdrawal decision. Id. See also The Washington Star, 729 F.2d at 1510.

Further, employers contemplating withdrawal have little incentive under the MPPAA to gamble that they will escape

liability, and employers remaining in the fund no longer need to terminate the plan precipitously to avoid assuming liability for the fund's entire shortfall. Although the MPPAA may not be a perfect solution, in that it assesses liability for withdrawals

where pension funds are not in danger of immediate insolvency, Congress has great flexibility to devise solutions to economic problems, see Turner Elkhorn Mining, 428 U.S. at 19; The Wasnington Star, 729 F.2d at 1510, and the wisdom or utility of legislation is for legislatures, not courts, to decide. Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963). As we have noted, determination of whether a plan is financially sound is a difficult calculation at best, and Congress had no obligation to deny relief to the funds until they unambiguously approached insolvency.

Thompson nevertheless argues that it is unfair to deprive it retrospectively of the benefit of its settled bargain with the Teamsters. R.A. Gray, however, makes clear that

even retroactive aspects of economic legislation satisfy due process if justified by a rational legislative purpose. R.A. Gray, 104 S.Ct. at 2718. We believe it was neither irrational nor inequitable for Congress to require Thompson to fund the pensions it offered its employees. Thompson obtained economic benefits from participation in the Plan. The pension may have attracted some experienced employees with previous contributions to the Plan to work for Thompson, rather than for other nonparticipating employers, and encouraged yet other employees to remain working until their

pension rights vested. Thompson profited from immediate access to a larger, skilled labor market and reduced labor turnover costs. In return, the employees expected to

receive a pension. At the time of its withdrawal, Thompson had fully received its benefits from offering the pension, but its employees had not received full payment for their services. See Standard Dye, 725 F.2d at 857; Nachman Corp., 592 F.2d at 962.

We find, as have other circuits that have addressed the issue, that Congress did not violate due process by imposing funding liabilities on employers who, after enactment of the MPPAA, withdrew from plans inadequately funded to meet their pension benefit obligations. See Keith Fulton, 741 F.2d 456-58 (withdrawal liability neither arbitrary nor irrational); The Washington Star, 729 F.2d at 1510 (not irrational for Congress to impose liability on employers who profited from employees' services in exchange for offer of pension plan); Standard

Dye, 725 F.2d at 852-53 (same); Peick, 724 F.2d at 1273 (not inequitable to impose liability on employers when pension plans are underfunded). Accord Republic Industries, 718 F.2d at 629 (not inequitable to impose liability on employers whc benefited from employees' services).

B. Procedural Objections

In R.A. Gray the Supreme Court did not address the constitutional arguments that Thompson levels against the Act's

procedural provisions, 104 S.Ct. at 2717 n.7, and our decision in Shelter Framing rested only on grounds of due process, 705 F.2d 1515. We therefore address Thompson's procedural contentions as a matter of first impression in this circuit.

1. Denial of an Impartial

Tribunal

Thompson contends that the MPPAA deprives Thompson of an impartial tribunal by giving the Fund's trustees initial responsibility to determine the withdrawal liability. See 29 U.S.C. § 1399. The trustees, Thompson contends, have an inherent interest in assessing as large a liability as possible, and, despite this alleged conflict of interest, the trustees' determination rebuttably is presumed correct. 29 U.S.C. §1401(a)(3).

Most of the appellate courts that have addressed this argument have found no institutional bias on the part of the trustees. See The Washington Star, 729 F.2d at 1511; Standard Dye, 725 F.2d at 855; Republic Industries, 718 F.2d at 640-41. But see Keith Fulton, 741 F.2d at 460-62. Many of the trustees' functions are ministerial,

not adjudicative in nature, thus diminishing the opportunities to inject bias. Republic Industries, 718 F.2d at 640 n.13. Moreover, they bring to this task a specialized knowledge of the Plan not available elsewhere, and are under a fiduciary duty to act neutrally and reasonably in assessing withdrawal liability. The Washington Star, 729 F.2d at 1511.

Page 14

We respectfully decline to follow the First Circuit's holding in Keith Fulton that the trustees are compelled by their fiduciary duty to the Fund to assess the highest possible liability, or that they may be motivated by intentions to punish the withdrawing employer or deter others from withdrawing. The method of computing liability is carefully prescribed by the Act. To the extent that the

presumption allows the trustees to select from a range of possible liabilities, the presumption is rational. Congress reasonably might have allowed the trustees a narrow range of flexibility to determine withdrawal liability conservatively. We agree with the reasoning of the Fourth Circuit in Republic Industries rejecting a similar challenge, 718 F.2d at 640-41 and find no denial of an impartial tribunal.

2. Lack of Preseizure Hearing

Thompson next argues that the Act unconstitutionally deprives Thompson of its property without a preseizure hearing, see Fuentes v. Shevin, 407 U.S. 67 (1972), by requiring payment of disputed amounts during the pendancy of a review or appeal challenging the accuracy of the Fund's calculations. See 29 U.S.C. § 1399(c)(2). Due

process requires an opportunity to be heard in a meaningful time and manner, Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and some form of hearing certainly is required before an individual finally is deprived of a property interest, Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

Page 15

We note, however, that on the record before us Thompson has not been deprived of any property. Thompson had statutory rights to point out inaccuracies in the trustees' calculations, request reconsideration by the trustees, 29 U.S.C. § 1399(b)(2), initiate arbitration, 29 U.S.C. § 1401(a)(1), and seek review by the courts, 29 U.S.C. § 1401 (b)(2). Even after the amounts became "due and owing," 29 U.S.C. § 1401(b)(1), the trustees merely commenced these

proceedings for collection. Consequently, Fuentes v. Shevin, involving seizure of property by government agents prior to a hearing, is inapposite. Thompson has been afforded all the process to which it was due. Accord Keith Fulton, 741 F.2d at 462-63; Standard Dye, 725 F.2d at 854; Republic Industries, 718 F.2d at 642.

3. Mandatory Arbitration

Thompson challenges the MPPAA's mandatory arbitration provisions on constitutional grounds. At the outset we note that Thompson failed to take the steps required by the Act to obtain arbitration. In Shelter Framing, however, we held that an employer may mount such a facial constitutional challenge to the Act's provisions without first submitting to arbitration. 705 F.2d at 1509.

Consequently, we will consider the constitutional arguments.

Thompson contends the MPPAA's mandatory arbitration provisions deny it the right to trial by jury. The seventh amendment, however, grants a right to trial by jury only in

actions known to the common law. The Fund's cause of action under the MPPAA never existed under common law. Congress may delegate fact-finding functions to non-jury bodies in cases involving newly created statutory rights. See, e.g., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458-61 (1977); The Washington Star, 729 F.2d at 1511; Standard Dye, 725 F.2d at 855.

Nor are we persuaded that the MPPAA's mandatory arbitration procedures, 29 U.S.C. § 1401(a), and

the statutory presumption of correctness accorded to the arbitrators' factual findings, 29 U.S.C. § 1401(c), unconstitutionally vest judicial functions in persons who lack the tenure and salary protections of article III. See U.S. Const. art. III, § 1. To make this argument, Thompson relies primarily on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), in which the Supreme Court invalidated a portion of the Bankruptcy Reform Act of 1978 on grounds similar to those Thompson urges here.

It is uncontested that the arbitrators are not judges for article III purposes. In Northern Pipeline, a plurality of the Court recognized only three narrow situations in which persons unprotected by article III could discharge judicial functions:

(1) territorial courts, (2) courts-martial, and (3) "legislative courts" created to adjudicate "public rights." Id. at 64-67. Only the third exception is arguably applicable here.

Page 17

Even if the arbitrators cannot be considered "legislative courts' exempt from the commands of article III, however, they still can function as factfinding "adjuncts" of the district court, provided that the court itself retains and exercises the essential attributes of federal judicial power. Northern Pipeline, 458 U.S. at 77. See, e.g., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. at 450 n.7; Crowell v. Benson, 285 U.S. 20, 51-65 (1932). As Northern Pipeline noted, however, the "essential attributes of judicial power", Northern Pipeline, 458

U.S. at 81, may differ depending on the type of rights at issue. Id. at 83. Congress possesses great discretion to delegate limited factfinding functions to specialized nonarticle III bodies and to create presumptions limiting judicial review where Congress itself has created the substantive federal right to be adjudicated. Id. By contrast, where rights arise from the Constitution or state law, Congress' power to encroach upon traditional judicial functions is much more limited. Id. at 84. In such cases, the court must retain power to review more closely the actions of the nonarticle III body.

In Crowell, for example, Congress created a system of compensation for injured federal employees and delegated to an administrative agency the responsibility to make limited factual

finds regarding the employees' injuries. The agency's factual findings were considered final if supported

by evidence, but the statute left the courts free to review de novo all questions of law. The Supreme Court held that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function . . . ."[6] Crowell, 285 U.S. at 54.

On the other hand, in United States v. Raddatz, 447 U.S. 667 (1980), the 1978 Federal Magistrates Act allowed nonarticle III magistrates to make findings and recommendations on a wide variety of pretrial motions, including those based on alleged violations of constitutional rights.

The Court upheld this broad delegation of judicial power only because the Act allowed de novo review by the court of both the factual and legal conclusions of the magistrate, Id. at 681-83, and the court controlled what issues were referred to the magistrate and could remove the magistrate from office. Id. at 685 (Blackmun, J., concurring). Accord Northern Pipeline, 458 U.S. at 85 (invalidating the Bankruptcy Act's similarly broad delegation because, inter alia, the bankruptcy court's judgment was reviewable only under a "clearly erroneous" standard); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 545-46 (9th Cir. 1984) (en banc) cert. denied, 53 U.S.L.W. 3236 (1984) (upholding consensual referral of civil suits to magistrates on the partial grounds that article III courts

retained full authority over questions of law, selected the magistrates and could cancel orders of reference sua sponte).

Page 19

The instant statute is most similar to the law at issue in Crowell. As in Crowell, Congress has created a system of substantive federal rights and responsibilities and has delegated to arbitrators the power to make limited factual findings in an area within which they possess special expertise. Only these factual findings are presumed correct, 29 U.S.C. § 1401(c), and therefore the district court may review de novo all conclusions of law. We find that, in this limited area of congressionally created statutory rights, the Act's reservation to the court of the authority to decide de novo all issues

of law and to review factual findings for a clear preponderance of the evidence "provides[s] for the appropriate exercise of the judicial function" by an article III tribunal. See Northern Pipeline, 458 U.S. at 81; Crowell, 285 U.S. at 54. Accord Republic Industries, 718 F.2d at 640; cf. Standard Dye, 725 F.2d at 855 (no denial of meaningful access to courts because MPPAA provides for judicial review of arbitration award); Peick, 724 F.2d at 1277 (same).

4. Taking Without Compensation

Finally, Thompson contends the MPPAA effects a "taking without compensation" by depriving Thompson of its property rights in its contract. The fifth amendment's takings clause, however, does not prohibit Congress from readjusting the contractual relationships of private parties. In

United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407 (1982), for example, a bank argued that the Bankruptcy

Reform Act's invalidation of the bank's liens on a debtor's property constituted an uncompensated taking. Although the Court avoided the constitutional question by construing the statute narrowly, its discussion of the takings clause indicated its adherence to a distinction between purely contractual rights and identifiable property rights:

> [O]ur cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same

creditor in the collateral. 103 S. Ct. at 411. Relying on Security Industrial Bank, the Seventh Circuit in Peick held that employers' contractual disclaimers of pension fund liability were not protected by the takings clause. Peick, 724 F.2d at 1276. Accord Keith Fulton, 741 F.2d at 462-63; Republic Industries, 718 F.2d at 642-43. We agree that the Act does not effect an uncompensated taking of Thompson's property.

II. Involuntary Withdrawal Because of Union Action

Thompson strongly argues that withdrawal liability is unfair because Thompson's withdrawal was involuntary, and was prompted by the union's unilateral disclaimer of representation. The record is silent on why the union withdrew, but Thompson does not allege that the withdrawal was

improperly motivated. This court is not faced, therefore, with the question whether a union legitimately could withdraw as a deliberate tactic to impose withdrawal liability on an employer.

Page 21

Thompson also claims that the assessment of withdrawal liability of $103,156.52 constitutes a taking of property without compensation. Withdrawal liabilities under the MPPAA, however, cannot be deemed a "taking" because such "interference arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good," Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1973). The employer's liability is assessed in rough proportion to the shortfall of the employer's contributions to the

vested benefits of the employer's employees. This liability is not so onerous or unfair as to constitute an unconstitutional taking.

Thompson concedes that Congress considered whether to adopt special liability rules for involuntary employer withdrawals caused by union action, but deferred decision pending a special study by the PBGC. See MPPAA, Pub. L. No. 96-364, § 412(a)(1)(B), 94 Stat. 1208, 1309 (1980).[7] This deferral indicates that Congress intended to allow withdrawal liability to attach in the interim. We therefore must consider whether Congress' inaction pending the study was rational.

At the outset we note that many, if not most, employer withdrawals are involuntary to some degree, but no appellate court has found that factor

relevant. See, e.g., Keith Fulton, 741 F.2d at 458 (logical for Congress not to distinguish between withdrawals on the basis of voluntariness); The Washington Star, 729 F.2d at 1506 (employer ceased publication

because of financial difficulties); Standard Dye, 725 F.2d at 846 (liquidation due to rising costs). Withdrawal liability attaches, not as a punishment for the employer's malice or willfulness in withdrawing from the plan, but to protect the vested pension interests of the employees. See 29 U.S.C. § 1001a (c)(3). In effect, the statute shifts to the employer the risks of business hazards that might cause withdrawal, presumably because the employer is in a better position to anticipate and insure against them. If employers escaped liability merely

because their withdrawals were involuntary, a major protective feature of the MPPAA would be undercut.

Thompson suggests that union-forced withdrawals are qualitatively different. The union ought not to be allowed to bargain for a pension plan, then hold the sword of withdrawal liability over the employer's head. Congress, however, reasonably might have assumed union-forced withdrawals would be rare and should be treated no differently from other business risks. Further, as we noted above, Thompson itself has obtained benefits from offering the pension and must bear responsibility for meeting its employees' legitimate expectations. Even if Thompson escapes liability, the Fund's shortfall will not become the union's responsibility; it will be made up, if at all, by

increasing contributions of other participating employers or by reducing benefits of the employees. Either alternative endangers the Fund, and defeats the policies of the Act.

Page 23

In light of the difficult questions surrounding the "union action" exception, Congress' decision to study the problem before legislating appears reasonable. We decline to read an exception into the statute.

CONCLUSION

The district court's summary judgment for the Fund is AFFIRMED.

FOOTNOTES

1. In contrast, single employer plan benefits were insured unconditionally upon enactment.

2. The record contains a copy of a letter from the Union's attorney and a Union notice, both stating the disclaimer without elaboration. The parties' briefs and the record are unilluminative of the reason the Teamsters issued the disclaimer.

3. Section 186, a portion of the Taft-Hartley Act, generally prohibits payments by employers to employee representatives. 29 U.S.C. § 186(a). Section 186(c) (5) carves out an exception for payments to certain

pension funds jointly administered by the employer and the representative union.

4. 29 U.S.C. § 1401(b)(1) provides that if neither party initiates arbitration, the amounts assessed by the trustees become "due and owing." As a prerequisite to initiating arbitration, the employer first must request the trustees to review their calculations. 29 U.S.C. § 1401(a)(1)(B). This request must occur within ninety days after the trustees notify the employer of the withdrawal liability. 29 U.S.C. § 1399(b)(2)(a). The same section invites the employer to identify any inaccuracies in the trustees' determinations and to provide additional relevant information to the trustees. Id. Despite a notice by the Fund outlining these procedures,

Thompson failed to request the trustees to review their calculations.

5. The Seventh Circuit in Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), affirmed on other grounds, 446 U.S. 359 (1980), analyzed four factors in determining whether ERISA violated due process: (1) the reliance interests of the parties affected; (2) whether impairment of the private interest occurred in an area previously subjected to government regulation; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. Nachman Corp., 592 F.2d at 960. In Shelter Framing we utilized the Nachman analysis to review the MPPAA's retroactive provisions. Shelter Framing, 705 F.2d 1510-15. The Supreme

Court in R.A. Gray, 104 S.Ct. at 2712 n.6, however, took note of the Nachman methodology, but rejected it as an appropriate vehicle for due process analysis, except as the Nachman factors might bear on whether legislation is rational. We have examined the MPPAA in light of Nachman, and we are confident that our decision would be unaffected if we were to employ the Nachman factors.

Page 25

6. Northern Pipeline interpreted the administrative agency in Crowell as serving the role of a factfinding adjunct of the district court. 458 U.S. at 78. We note, however, that the public rights doctrine also might have applied.

7. Section 412 provides in relevant part:

> (a) (1) The Pension Benefit Guaranty Corporation shall conduct a separate study with respect to --
>
> . . .
>
> (B) the necessity of adopting special rules in cases of union-mandated withdrawal from multi-employer pension plans.
>
> (2) The Corporation shall report to the Congress the results of the studies conducted under paragraph

(1), including its recommendations with respect thereto.

The PBGC has not yet issued a report.

APPENDIX D

TEXT OF PERTINENT SECTIONS OF TITLE 29 OF THE UNITED STATES CODE

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29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability.

(a) Furnishing of information by employer to plan sponsor. An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part [29 USCS §§ 1381 et seq.].

(b) Notification, demand for payment,

and review upon complete or partial withdrawal by employer. (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall -

(A) notify the employer of -

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer -

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments.

(ii) may identify any inaccuracy

in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of -

(i) the plan sponsor's decision,

(ii) the basis for the decision, and,

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and

(5), an employer shall pay the amount determined under section 4211 [29 USCS § 1391], adjusted if appropriate first under section 4209] 29 USCS § 1389] and then under section 4206 [29 USCS § 1386] over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent

actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of -

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate

at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 4205(a)(1) [29 USCS § 1385(a)(1) shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 4205(b)(1)(B)(i) [29 USCS § 1385(b)(1)(B)(i)].

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3

consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to

contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan -

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and (ii) notwithstanding any other provision of this part [29 USCS §§ 1381 et seq.], the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations with shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant

to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 4205(a) [29 USCS § 1385(a)], the amount of each annual payment shall be the product of -

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 4206(a)(2) [USCS § 1386(a)(2)].

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for

review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described

in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the firs payment which was not timely made. For purposes of this section, the term "default" means -

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in

rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules -

(A) are consistent with this Act, and,

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under

this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions. The prohibitions provided in section 406(a) [29 USCS § 1106(a)] do not apply to any action required or permitted under this part [29 USCS §§ 1381 et seq.].

29 U.S.C. § 1401(a)(1). Resolution of disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made

under sections 4201 through 4219 [29 USCS §§ 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of -

(A) the date of notification to the employer under section 4219(b)(2)(B) [29 USCS § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A) [29 USCS § 1399(b)(2)(A)]

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1) [29 USCS § 1399(b)(1)].

29 U.S.C. § 1401(a)(3). Resolution of

disputes.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 [29 USCS §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that -

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable

(taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

29 U.S.C. § 1301(a)(10)(A). Definitions.

(a) For purposes of this title, the term -

(10) "plan sponsor" means, with respect to a multiemployer plan -

(A) the plan's joint board of trustees, or

29 U.S.C. § 186(c)(5). Restrictions of payments to employee representatives.

(c) The provisions of this section shall not be applicable

(5) with respect to money or other thing of value paid to a

trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or

insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons

empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such

other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

29 U.S.C. § 1001a. Additional Congressional findings and declaration of policy.

(a) The Congress finds that -

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans

have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer

withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that -

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of this Act -

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

(Sept. 26, 1980, P. L. 96-364, § 3, 94 Stat. 1209.)

(2)

No. 84-1443

FILED

MAR 21 1985

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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19pp

TABLE OF AUTHORITIES

Cases Cited: Page

Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, No. 83-1804, 5 Employee Benefits Cases (BNA) ("EBC") 1761 (1st Cir. Aug. 6, 1984), *vacated in part and rehearing granted*, Order of October 22, 1984 ..... 2, 3

Peick v. Pension Benefit Guaranty Corporation, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-1246) 2

Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-541) 2

The Terson Company v. Bakery Drivers and Salesmen Local 194 and Industry Fund, 739 F.2d 118 (3d Cir. 1984) 2

Textile Workers v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir. 1984), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International Union of America*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-1646) 2

Washington Star Company v. International Typographical Union Negotiated Pension Fund, 729 F.2d 1502 (D.C. Cir. 1984) 2

United States Code Cited:

29 U.S.C. §§ 1301-1481 (1982) 2
29 U.S.C. § 1302(b)(1) (1982) 2
29 U.S.C. § 1306 note (1982) 3
29 U.S.C. § 1401(a) (1982) 3
29 U.S.C. § 1401(a)(3) (1982) 3

Acts of Congress Cited:

Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494-1210 (1984) 3

TABLE OF AUTHORITIES—Continued

Page

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), *amending* the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829-1035 (1974) 1, 3

Rule of the Supreme Court of the United States Cited:

Sup. Ct. R. 36.4 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1443

THOMPSON BUILDING MATERIALS INCORPORATED,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

---

1. The first, second, fourth, and fifth Questions Presented by the petition for certiorari in this case are a constitutional attack on the procedures for the assessment, collection, and adjudication of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act").[1] The appellate courts

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[1] 29 U.S.C. §§ 1381-1405, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), *amending* the Employee Retirement Income Security Act

have unanimously decided these questions in favor of the Act's constitutionality. *The Terson Company v. Bakery Drivers and Salesmen Local 194 and Industry Fund*, 739 F.2d 118, 121 (3d Cir. 1984) (*"Terson"*); *Washington Star Company v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984) (*"Washington Star"*); *Textile Workers v. Standard Dye & Finishing Co.*, 725 F.2d 843, 854-55 (2d Cir. 1984), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International Union of America*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-1646) (*"Textile Workers"*); *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1274-77 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June, 25, 1984) (No. 83-1246) (*"Peick"*); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 639-43 (4th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-541) (*"Republic"*). *See also Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, No. 83-1804, 5 Employee Benefits Cases (BNA) ("EBC") 1761, 1768, 1770-72 (1st Cir. Aug. 6, 1984), *vacated in part and rehearing granted*, Order of October 22, 1984 (Appendix to this Brief ("App.") 1a) (*"Keith Fulton"*), and paragraph 3, *infra*.

2. The third Question Presented seeks an exception to the imposition of withdrawal liability triggered by a withdrawal from a multiemployer pension plan that is

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of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829-1035 (1974), 29 U.S.C. §§ 1301-1481 (1982).

Rule 36.4 of the Rules of this Court authorizes the filing of a brief *amicus curiae*, without the consent of the parties, by "any agency of the United States authorized by law to appear in its own behalf." The Pension Benefit Guaranty Corporation has such legal authority pursuant to 29 U.S.C. § 1302(b)(1) (1982).

purportedly involuntary and union-mandated. This case presents no such issue. By failing to participate in the mandatory arbitration proceeding for resolving disputes under the Multiemployer Act, 29 U.S.C. § 1401(a), petitioner waived its opportunity to develop any factual record that might justify a conclusion that this case actually involves an involuntary withdrawal.[2] In any event, Congress considered the problem of "union-mandated" withdrawals, but decided to reserve a legislative solution pending further study.[3] The court below properly concluded that Congress' deferral of any such exception as that proposed by petitioner "indicates that Congress intended withdrawal liability to attach in the interim." Slip op. at 21 (Appendix to Petition for Writ of Certiorari 48).

3. The sixth Question Presented suggests that certiorari should be granted to resolve a "conflict in principle" among the circuits. Petitioner relies on the decision of a panel of the First Circuit in *Keith Fulton*, holding unconstitutional the presumptions of 29 U.S.C. § 1401(a)(3). 5 EBC at 1768-70. However, the *Keith Fulton* opin-

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[2] Indeed, petitioner argued in the court below that it had withdrawn pursuant to a binding agreement with the union entered on September 26, 1980, and hence that it owed no withdrawal liability. Notice of Motion and Motion to Remand at 4-5 (App. 6a-7a). See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 558(d), 98 Stat. 494, 899 (1984) (App. 10a).

[3] SEC. 412. STUDIES BY PENSION BENEFIT GUARANTY CORPORATION AND SECRETARY OF LABOR.

(a)(1) The Pension Benefit Guaranty Corporation shall conduct a separate study with respect to—

. . .

(B) the necessity of adopting special rules in cases of union-mandated withdrawal from multiemployer pension plans.

(2) The Corporation shall report to the Congress the results of the studies conducted under paragraph (1), including its recommendations with respect thereto.

Multiemployer Act, Pub. L. No. 96-364, 94 Stat. 1309, 29 U.S.C. § 1306 note (1982).

ion on this question has been vacated and withdrawn pending a decision on rehearing. Order of October 22, 1984 (App. 1a). As a result, no conflict exists among the circuits as to any of the Questions Presented by petitioner.

4. For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 21, 1983

APPENDIX

TABLE OF CONTENTS

Page

Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, No. 83-1804 (1st Cir. October 22, 1984) (order granting rehearing) 1a

Appellant's Notice of Motion and Motion to Remand filed in *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials Incorporated*, No. 83-5893 (9th Cir. Dec. 27, 1984) 3a

Public Law 98-369, 98 Stat. 494, 899, July 18, 1984..... 10a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1804

KEITH FULTON & SONS, INC.,
Plaintiff, Appellant,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, ET AL.,
Defendants, Appellees.

Before
Campbell, *Chief Judge,*
Coffin, Bownes and Breyer, *Circuit Judges*

ORDER

Entered October 22, 1984

Appellees' petition for rehearing en banc and the suggestion for reahearing en banc filed by intervenor Pension Benefit Guaranty Corporation are allowed. Since rehearing is requested, and is allowed, only with respect to the issue of the constitutionality of 29 U.S.C. § 1401 (a)(3), the panel's judgment is vacated only with respect to that issue.

Argument will be heard during the December 1984 session. The case will stand on the briefs and memoranda filed to date (including the submissions of the Pension Benefit Guaranty Corporation), except that the appellant, the appellees and the intervenor may each file

a supplemental brief not to exceed 20 pages not later than November 19, 1984. Counsel for the Pension Benefit Guaranty Corporation may participate in oral argument, but if so, appellees' time will be correspondingly reduced so that the time available to appellant will be equal to that of both appellees and intervenor.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

[1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5893

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Plaintiff-Appellee,

vs.

THOMPSON BUILDING MATERIALS, INCORPORATED,
a California corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HERBERT A. MOSS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5893

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Plaintiff-Appellee,

vs.

THOMPSON BUILDING MATERIALS, INCORPORATED,
a California corporation,
Defendant-Appellant.

NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HERBERT A. MOSS

TO: PLAINTIFF-APPELLEE, BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND AND TO ITS ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that defendant-appellant THOMPSON BUILDING MATERIALS, INC., shall

move this court to remand the above-entitled case to the District Court for the Central District of California.

This motion shall be based on Fed.R.App.P. 27(9) [sic], the foregoing notice, the within points and authorities, the pleadings, records and files in this action, and the declaration of Herbert [?] A. Moss. The ground for this motion is to allow a reassessment in light of a change of law, as set forth more fully below.

DATED: September 28, 1984

LAW OFFICES OF
ROGER A. SAEVIG

By: /s/ Roger A. Saevig
ROGER A. SAEVIG

Attorneys for Defendant-Appellant
THOMPSON BUILDING MATERIALS, INC.

[4]

POINTS AND AUTHORITIES

I

A FEDERAL APPELLATE COURT MAY REMAND A CASE TO FEDERAL DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF INTERVENING AMENDMENT TO A FEDERAL STATUTE.

The authority of appellate courts to remand a case to a district court for reconsideration of changes in the law is well established by case law. *Soric vs. Immigration & Naturalization Service* (1965) 382 US 285, 86 S.Ct. 432, 15 L.Ed 2d 330.

This case concerns defendant-appellant's liability under 29 U.S.C. § 1381, *et seq.* (hereinafter referred to as the MPPAA). The Deficit Reduction Act of 1984 § 558 intervenes and modifies liability under the MPPAA specifically § 558(D) [sic] states that "In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection a(1) shall be applied by substituting "December 31, 1980 for September 26, 1980." Section a(1) states that any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of Title IV of the Employee Retirement Security Act of 1974 (29 U.S.C. § 1381, *et seq.*) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void. Deficit Reduction Act of 1984, (1984) CCH Standard Tax Reports No. 27, June 26, 1984.

Defendant-Appellant contends that the actions between them and Teamsters Local 952 on September 26, 1980, resulted in a binding agreement to withdraw from a multiemployer plan, within the meaning of § 558 of the Deficit Reduction Act of 1984.

[5]

Plaintiff-Appellee has unilaterally determined that THOMPSON BUILDING MATERIALS, INC. withdrew from the plan on October 1, 1980, just five (5) days later than the all important September 26th date. A true and correct copy of a letter fixing the withdrawal date of October 1, 1980 is included herein as Exhibit "A" and is incorporated herein by reference as if set forth in full.

Accordingly, the Appellate Court should remand this case to the District Court for the Central District of California with directions to consider defendant-appellant's liability under 29 U.S.C. § 1381 *et seq.* as amended by the Deficit Reduction Act of 1984.

II

A FEDERAL COURT MAY REMAND A CASE TO FEDERAL DISTRICT COURT FOR FINDINGS OF FACT.

An appellate court may remand a case to the District Court if no findings of fact were made. *Panama Mail S.S. Co. vs. Vargas* (1930) 28 US 670, 50 S.Ct. 448, 74 L.Ed 1105.

In this case, no findings were made as to the applicability of § 558 of the Deficit Reduction Act of 1984 by the court below. Specifically, there is little or no factual record indicating whether defendant-appellant had on September 26, 1980, a binding agreement to withdraw from the multiemployer pension plan, within the meaning of the new law.

Defendant-appellant contends that the actions of the respective parties on or before September 26, 1980 resulted in a Binding Agreement to withdraw from the multiemployer plan on [6] September 26, 1980. Accordingly, the absence of sufficient facts require that the case be remanded to Federal District Court for the Central Dis-

trict Court of California for findings of fact relevant to the application of § 558 of the Deficit Reduction Act of 1984 to this case, in order to properly determine defendant-appellant's liability under 29 U.S.C. § 1381 *et seq.*

CONCLUSION

For the foregoing reasons, the motion to remand to the Federal District Court for the Central District of California should be granted.

DATED: September 28, 1984

LAW OFFICES OF
ROGER A. SAEVIG

By: /s/ Roger A. Saevig
ROGER A. SAEVIG

Attorneys for Defendant-Appellant
THOMPSON BUILDING MATERIALS, INC.

DECLARATION OF HERBERT A. MOSS

I, HERBERT A. MOSS, declare as follows:

1. I was the labor relations attorney for Defendant-Appellant THOMPSON BUILDING MATERIALS, INC., in 1980 and have personal knowledge of the matters set forth in this declaration.

2. I make this declaration in support of the motion to remand the above-entitled action to the District Court.

3. On or about September 1980, I conducted negotiations with Teamsters Local 952 for the purpose of arriving at a new Collective Bargaining Agreement.

4. On September 26, 1980, a legal impasse resulted. Once the impasse was reached on said date, I told the union negotiators that certain unilateral changes would be instituted one of which was the complete and permanent cessation of future contributions into the Pension Trust Fund.

5. As a direct result of the events of September 26, 1980, defendant-appellant ultimately became liable under the Multi-employer Pension Plan Amendments Act of 1980, 19 [sic] U.S.C. § 1381, *et seq.*

I declare under penalty of perjury that the above is true and correct to the best of my knowledge.

Executed this 1st day of October, 1984, at Santa Ana, California.

/s/ Herbert A. Moss
HERBERT A. MOSS

PUBLIC LAW 98-369 [98 Stat. 494, 899]; July 18, 1984
DEFICIT REDUCTION ACT OF 1984

An Act to provide for tax reform, and for deficit reduction.

Be it enacted by the Senate and House of Representatives of the United States in Congress Assembled,

* * * *

SEC. 558. ELIMINATION OF RETROACTIVE APPLICATION OF AMENDMENTS MADE BY MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980.

(a) IN GENERAL.—

(1) LIABILITY.—Any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381 et seq.) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void.

* * * *

(d) SPECIAL RULE FOR CERTAIN BINDING AGREEMENTS.—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting "December 31, 1980" for "September 26, 1980".

NO. 84-1443

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does the ruling below--which correctly rejects an employer's various constitutional challenges to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act, and is consistent with the decisions of this Court and the Courts of Appeal--require review by this Court?

2. Where Congress has chosen to apply the Multiemployer Pension Plan Amendments Act to both voluntary and involuntary employer withdrawals from multiemployer pension plans, did the court below correctly decline to exempt involuntary withdrawals from the statute?[1]

---

1 The parties are set forth in the title; respondent Board of Trustees of the Western Conference of Teamsters Pension Trust Fund is the sponsor of a multiemployer pension plan as defined in section 4001 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1301).

TABLE OF CONTENTS

	Page
Questions presented for review	i
Preliminary statement	1
Statement of the case	2
Argument	8
I. The ruling below, which rejects petitioner's various constitutional challenges to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act, is consistent with the decisions of this Court and the Courts of Appeals	12
II. The Multiemployer Pension Plan Amendments Act applies to both voluntary and involuntary withdrawals from multiemployer pension plans	18
Conclusion	21

TABLE OF AUTHORITIES

	Pages
Cases	
Keith Fulton & Sons v. New England Teamsters, 741 F.2d 451	10, 15
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96	13
Peick v. Pension Ben. Guar. Corp., 742 F.2d 1247	10, 17, 18
Penn Central Transp. Co. v. New York City, 438 U.S. 104	18
Pension Ben. Guar. Corp. v. R. A. Gray & Co., ___ U.S. ___, 104 S.Ct. 2709	8, 9
Republic Industries v. Teamsters Joint Council, 718 F.2d 628 ..	10, passim
Textile Workers Pension Fund v. Standard Dye & Finishing, 735 F.2d 843	9, 13, 16
The Washington Star Co. v. Intern. Typo. U. N. Pen. Plan, 729 F.2d 1502	9, 14

Pages

Statutes

Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq. 3, 4

Section 4001, 29 U.S.C. § 1301 i

Multiemployer Pension Plan Amendments Act, 94 Stat. 1208 2, passim

29 U.S.C. § 1382 14
29 U.S.C. § 1399(b)(2)(a) 5
29 U.S.C. § 1401(a) 15
29 U.S.C. § 1401(b) 5, 6, 16
29 U.S.C. § 1401(c) 6

No. 84-1443

In the Supreme Court of the

United States

October Term, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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PRELIMINARY STATEMENT

Petitioner has not set forth a single ground for granting of certiorari which merits serious consideration by this Court. In rejecting petitioner's

constitutional challenges to the Multi-employer Pension Plan Amendments Act ("MPPAA"; 94 Stat. 1208), the decision below is consistent with a recent decision of this Court and numerous decisions of the Courts of Appeals. Moreover, the Court of Appeals correctly held that MPPAA applies to petitioner's allegedly "involuntary withdrawal" from a pension plan: Congress has already chosen to apply MPPAA to such withdrawals, and the courts below properly declined to read an exception into the statute, as petitioner now urges. There is no need for review by this Court.

STATEMENT OF THE CASE

Petitioner's statement of the facts is incomplete. The relevant facts, which are summarized in the opinion of the Court of Appeals, are as follows:

Enacted in 1974, the Employee Retirement Income Security Act ("ERISA") established a system of insurance to protect employees' interests in pension benefits in the event that their pension plan failed or was terminated with insufficient funds (Pet.Appx., p. 49). ERISA established the Pension Benefit Guaranty Corporation ("PBGC") to administer the insurance program, which is funded by premium payments from the pension plans (Pet.Appx., p. 49).

As originally enacted, ERISA allowed the PBGC to exercise its discretion in guaranteeing pension benefits in multiemployer plans (Pet.Appx., pp. 49-50). If a plan terminated, employers who had previously withdrawn from the plan incurred liability to the PBGC if certain contingencies were met: If the PBGC decided to pay the employees, each employer who had contributed to the

plan during the five-year period preceding the termination would be liable for its proportionate share, up to 30 percent of the employer's net worth (Pet.Appx., p. 50).

In 1980, Congress enacted MPPAA in response to a comprehensive report by the PBGC which demonstrated "that ERISA in its original form 'threaten[ed] the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress'" (Pet.Appx., p. 63). MPPAA changed the liability of employers who withdraw from multiemployer plans (Pet.Appx., p. 51). MPPAA requires withdrawing employers to pay the fund a proportionate share of the fund's "unfunded vested benefit liability," a measure of the shortfall in the fund's assets (Pet.Appx., p. 51). The unfunded

vested benefit liability is the difference between a pension fund's assets and the actuarial present cash value of the benefits that have vested (Pet.Appx., p. 51).

When an employer withdraws, the plan's trustees have initial responsibility to calculate the employer's withdrawal liability under one of the several different methods specified by MPPAA (Pet.Appx., pp. 51-52). If the employer disputes either the fact or the amount of liability, it has the right to request reconsideration of the matter by the plan's trustees (29 U.S.C. § 1399(b)(2)(A)); if the employer is not satisfied with the trustees' response, either party has the right to invoke arbitration (29 U.S.C. § 1401(a); Pet. Appx., p. 52). Either party to arbitration may apply to a district court "to enforce, vacate, or modify the arbitrator's

award"; in any such proceeding the arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of the evidence (29 U.S.C. § 1401(b) & (c); Pet.Appx., p. 52-53).

In this case, petitioner challenges the constitutionality of MPPAA's withdrawal liability provisions (Pet.Appx., p. 54). Petitioner had been a participating employer in the Western Conference of Teamsters Pension Plan (the "Plan") until its withdrawal from the Plan on December 2, 1980, when petitioner ceased its contributions to the Plan (Pet.Appx., p. 53).

Respondent Board of Trustees of the Western Conference of Teamsters Pension Trust Fund ("Trust Fund"), the sponsor of the Plan, notified petitioner that petitioner was liable for

$103,156.53 in withdrawal liability, its portion of the Plan's unfunded vested benefit liability (Pet.Appx., p. 54). Petitioner did not request a reconsideration by the Trust Fund of its calculation, nor did petitioner take the other steps required to initiate arbitration under MPPAA (Pet.Appx., p. 54). Petitioner also failed to pay its withdrawal liability (Pet.Appx., p. 54).

The Trust Fund brought an action in the district court to collect the amounts owing (Pet.Appx., p. 54). The district court granted the Trust Fund summary judgment (Pet.Appx., p. 54). The Court of Appeals affirmed, rejecting petitioners' various constitutional challenges to MPPAA (Pet.Appx., pp. 55-84) and noting that several other circuits have upheld MPPAA against similar constitutional attacks (Pet.Appx., p. 57). The Court of Appeals also

rejected petitioner's argument that an exception should be read into MPPAA for employers whose withdrawal from a plan is "involuntary" or caused by union action (Pet.Appx., pp. 56-57).

ARGUMENT

The crux of petitioner's position before the Court of Appeals was that MPPAA violates the due process clause of the Fifth Amendment by impermissibly impairing contractual obligations (Pet.Appx., pp. 58-69). But this Court's recent decision in Pension Ben. Guar. Corp. v. R. A. Gray & Co. (1984) ___ U.S. ___, 104 S.Ct. 2709 squarely rejects this argument: Even where applied retroactively, the withdrawal liability provision of MPPAA "is supported by a rational legislative purpose, and therefore withstands attack under the

Due Process Clause of the Fifth Amendment" (104 S.Ct. 2720).

In urging this Court to review again the constitutionality of MPPAA, petitioner now relies upon a grab-bag of other constitutional theories--ranging from an alleged "right to a preseizure hearing" to a "right to access to the courts." In rejecting each of petitioner's theories, the decision below was entirely consistent with this Court's decisions and those of the Courts of Appeals. All of petitioner's arguments challenging the constitutionality of MPPAA have been rejected by every Court of Appeals decision reaching the merits of those issues (The Washington Star Co. v. Intern. Typo. U. N. Pen. Plan (D.C.Cir. 1984) 729 F.2d 1502; Textile Workers Pension v. Standard Dye & Finishing (2 Cir. 1984) 725 F.2d 843, certiorari denied (1984) 104 S.Ct. 3554;

Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, certiorari denied (1984) 104 S.Ct. 3554; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, certiorari denied (1984) 104 S.Ct. 3553). Contrary to petitioner's erroneous assertion, the First Circuit has not found any portion of MPPAA to be unconstitutional (see Pet., pp. 12-13). In fact, the First Circuit, sitting en banc, has vacated the portion of an opinion by one of its panels that had found one provision of MPPAA to be unconstitutional (Keith Fulton & Sons v. New England Teamsters (1 Cir. 1984) 741 F.2d 451, vacated in part (1 Cir. Oct. 22, 1984), reheard en banc (1 Cir. Dec. 5, 1984); see Appendix hereto).

In asking this Court to exempt "involuntary" withdrawals from the coverage of MPPAA, petitioner is request-

ing this Court to adopt an exemption which Congress has already considered and rejected (Pet.Appx., p. 86). Petitioner concedes that Congress "chose to ignore the problem" (Pet., p. 10) of involuntary withdrawals; more accurately, Congress simply deferred making any decision to exempt involuntary withdrawals, pending a study by the PBGC (Pet.Appx., p. 86). The Court of Appeals properly held that "Congress' decision to study the problem before legislating appears reasonable. We decline to read an exception into the statute" (Pet.Appx., p. 89).

I. THE RULING BELOW, WHICH REJECTS PETITIONER'S VARIOUS CONSTITUTIONAL CHALLENGES TO THE WITHDRAWAL LIABILITY PROVISIONS OF THE MULTI-EMPLOYER PENSION PLAN AMENDMENTS ACT, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

Petitioner's argument that it has been deprived of property without a preseizure hearing (Pet., pp. 4-7) is based on the erroneous assertion that petitioner "sustain[ed] a loss of his property" without a prior opportunity to be heard (Pet., p. 5). But, as the Court of Appeals noted, "on the record before us Thompson has not been deprived of any property" (Pet.Appx., p. 73). No property petitioner has been "seized"; the fact that the trustees commenced proceedings to collect the withdrawal liability does not, by itself, constitute a seizure or a

deprivation of property that would require a prior hearing (New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co. (1978) 439 U.S. 96, 104-105). Petitioner has had an ample opportunity to contest its liability by requesting reconsideration by the trustees, initiating arbitration, or seeking review by the courts; petitioner "has been afforded all the process to which it was due" (Pet.Appx., p. 74; accord, Textile Workers Pension Fund v. Standard Dye & Finishing Co. (2 Cir. 1984) 725 F.2d 843, 854, certiorari denied (1984) 104 S.Ct. 3554; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 642, certiorari denied (1984) 104 S.Ct. 3553).

Petitioner also contends that MPPAA deprives petitioner of an impartial tribunal by giving the plan's trustees the initial responsibility to calculate the employer's withdrawal liability

(Pet., pp. 7-8).[2] Petitioner fails to come to grips with the fact that the trustees' functions are ministerial and that the method of computing liability is carefully prescribed by MPPAA (Pet.Appx., pp. 70-71). Moreover, the Court of Appeals pointed out, the trustees have natural incentives to act neutrally and reasonably in assessing withdrawal liability (Pet.Appx., p. 40; accord, The Washington Star Co. v. Intern. Typo. U. N. Pen. Plan (D.C.Cir. 1984) 729 F.2d 1502, 1511; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 640-641 certiorari denied (1984) 104 S.Ct. 3553).

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2 Contrary to petitioner's suggestion (Pet., p. 7), the trustees do not serve as arbitrators during the arbitration proceedings; they merely make the initial calculation of the Fund's claim prior to any arbitration (29 U.S.C. § 1382).

Contrary to petitioner's erroneous assertion, there is no conflict among the circuits on this point. The First Circuit opinion referred to by petitioner (Keith Fulton & Sons v. New England Teamsters (1 Cir. 1984) 741 F.2d 451) has been vacated in pertinent part and reheard en banc. The First Circuit expressly vacated that portion of the panel's opinion that dealt with the issue raised by petitioner--the constitutionality of MPPAA's provisions concerning the calculation by the trustees of the amount of withdrawal liability (29 U.S.C. § 1401(a)(3); see Appendix hereto).[3]

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3 Interestingly, the First Circuit did not vacate the portions of the panel decision that had rejected the employer's constitutional challenges similar to those raised by petitioner--substantive due process, seventh amendment, right to access to the courts, taking of property, and deprivation of property without a prompt hearing.

There is no basis for petitioner's contention (Pet., pp. 10-11) that MPPAA, by requiring withdrawal liability disputes to be presented initially to arbitrators, denies employers access to the courts. At most, petitioner quarrels with the timing of its access to the courts; it is beyond dispute that MPPAA expressly provides for judicial review by the district court of any arbitration award (29 U.S.C. § 1401(b)(2)). The Court of Appeals properly held that MPPAA's "reservation to the court to decide de novo all issues of law and to review factual findings for a clear preponderance of the evidence 'provide[s] for the appropriate exercise of the judicial function' by an article III tribunal" (Pet.Appx., pp. 81-82; accord, Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 640; Textile Workers Pension Fund v. Standard

Dye & Finishing (2 Cir. 1984) 725 F.2d 843, 855, certiorari denied (1984) 104 S.Ct. 3554; Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, 1277, certiorari denied (1984) 104 S.Ct. 3554).

Finally, in rejecting petitioner's argument that MPPAA effects a taking without compensation, the Court of Appeals correctly held that nothing "prohibit[s] Congress from readjusting the contractual relationships of private parties" (Pet.Appx., p. 82) and that "employers' contractual disclaimers of pension fund liability were not protected by the takings clause" (Pet.Appx., p. 84). In requiring withdrawing employers to pay their fair share of the unfunded vested benefit liability (which results from the shortfall of employer contributions), MPPAA is simply "adjusting the benefits and burdens of economic

life to promote the common good" (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 124); indeed, MPPAA forces employers to bear a burden which is rightfully theirs (Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 642-643, certiorari denied (1984) 104 S.Ct. 3553; accord, Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, 1276, certiorari denied (1984) 104 S.Ct. 3554).

II. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT APPLIES TO BOTH VOLUNTARY AND INVOLUNTARY WITHDRAWALS FROM MULTIEMPLOYER PENSION PLANS.

There is no need for this Court to consider whether "an exception to liability under [MPPAA] should be recognized where an employer's withdrawal from the plan was involuntary" (Pet., p. 8),

because Congress has already considered and declined to adopt such an exception. Congress considered the possibility of adopting special rules in cases of "involuntary" withdrawals caused by union action, but, according to petitioner, Congress "chose to ignore the problem" (Pet., p. 10). In fact, Congress chose to treat involuntary and voluntary withdrawals the same under MPPAA; it directed the PBGC to conduct a study of the matter, thus postponing indefinitely any consideration of exempting involuntary withdrawals (Pet.Appx., p. 86). Congress' refusal to exempt involuntary withdrawals from MPPAA is entirely consistent with the purposes of the statute--to protect pension plans from the adverse financial impact of employer withdrawals, whether voluntary or involuntary (Pet.Appx., p. 87).

In any event, this is not a case where an employer "was victimized" by a union's withdrawal "as a deliberate tactic to impose withdrawal liability on an employer" (Pet., pp. 9-10).[4] The record does not show why the union withdrew because petitioner made no attempt in the district court proceedings to allege or show that the union's

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4 Indeed, petitioner's representations to the Court of Appeals suggest that petitioner's withdrawal was not even "involuntary." Petitioner argued below that it had entered into a binding agreement with the union to withdraw from the plan on September 26, 1980 (Notice of Motion and Motion to Remand (9 Cir. Sept. 28, 1984) p. 4). Petitioner's counsel stated that petitioner elected to make its own unilateral decision to cease making contributions to the plan:

> Once the impasse was reached on said date, I told the union negotiators that certain unilateral changes would be instituted one of which was the complete and permanent cessa-

(Footnote Continued)

withdrawal was improperly motivated (Pet.Appx., pp. 84-85). That issue is simply not presented by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PILLSBURY, MADISON & SUTRO

Of Counsel

(Footnote Continued)

tion of future contributions into the Pension Trust Fund" (Declaration of Herbert A. Moss (9 Cir. Oct. 1, 1984)).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1804

KEITH FULTON & SONS, INC.,
Plaintiff, Appellant,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING
INDUSTRY PENSION FUND, ET AL.,
Defendants, Appellees.

Before
Campbell, Chief Judge,
Coffin, Bownes and Breyer, Circuit Judges.

ORDER
Entered October 22, 1984

Appellees' petition for rehearing en banc and the suggestion for rehearing en banc filed by intervenor Pension Benefit Guaranty Corporation are allowed. Since rehearing is requested, and is allowed, only with respect to the issue of the constitutionality of 29 U.S.C. § 1401(a)(3), the panel's judgment is vacated only with respect to that issue.

Argument will be heard during the December 1984 session. The case will stand on the briefs and memoranda filed to date (including the submissions of the Pension Benefit Guaranty Corporation), except that the appellant, the appellees and the intervenor may each file a supplemental brief not to exceed 20 pages not later than November 19, 1984. Counsel for the Pension Benefit Guaranty Corporation may participate in oral argument, but if so, appellees' time will be correspondingly reduced so that the time available to appellant will be equal to that of both appellees and intervenor.

By the Court,

[Francis P. Scigliano]

Clerk.